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# Section 108 of Title 17: A Discussion Document of the Register of Copyrights

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## SECTION 108 OF TITLE 17

A DISCUSSION DOCUMENT OF THE REGISTER OF COPYRIGHTS

SEPTEMBER 2017





## **SECTION 108 OF TITLE 17**

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For over a decade—since 2004, in fact—the U.S. Copyright Office has been involved in efforts to review and revise section 108 of the Copyright Act: the exceptions for libraries and archives. I want to profusely thank all of the Office’s partners in this endeavor, from the chairs, members, and staff of the Section 108 Study Group, to the erudite commenters and passionate roundtable participants during the Study Group process, to the participants in the 2016 stakeholder meetings; and, of course to past Copyright Office leadership and staff who provided this project with such a solid foundation.

Our current Discussion Document is the culmination of these many years of review and analysis. It represents the efforts of numerous current Copyright Office staff members who have contributed drafting, editorial input, and overall analysis of the proposed recommendations. Chris Weston, Counsel for Policy and International Affairs, served as the primary author. His extensive experience on this issue, including participating in the 2005–2008 Section 108 Study Group process, was invaluable. Weston managed and oversaw the summer 2016 stakeholder meetings, as well as the Model Statutory Language.

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## I. EXECUTIVE SUMMARY

For over a decade, the U.S. Copyright Office and other groups have explored the operation of section 108 of the U.S. Copyright Act (exceptions for libraries and archives) with an eye toward updating the provision for the digital age. After more recent study and review, the Copyright Office is now issuing the present Discussion Document in an effort to facilitate final resolution of this important topic.

The Office remains firm in its belief that section 108 needs to be updated so that libraries, archives, and museums have a robust, comprehensible, and balanced safe harbor in order to fulfill their missions. The current section 108 language is insufficient to address digital works and digital transmissions, does not reflect the way that libraries and archives actually operate, and excludes museums, among other constraints. Moreover, many of its provisions are vague and difficult to understand. After many years of study, a comprehensive update to section 108 remains an important aspect of any thorough review of the copyright system. Still, the Office is sensitive to the fact that many members of the library and archives communities have expressed concern about revising section 108.<sup>1</sup> These concerns range from the manner in which the inquiry was conducted, to the retention of the fair use savings clause (section 108(f)(4)), to whether a revision is necessary at all. While these concerns are legitimate, many may be resolved through careful drafting and discussion, and should not entirely foreclose productive dialogue to improve the functioning of section 108. Moreover, the present moment offers a rare opportunity to benefit from Congress' focus on copyright law in the digital era to make needed changes to section 108 that, in another time, might not find as willing an audience.

The objective of the Discussion Document is therefore threefold: first, to review the issues raised over the past decade of revision work; second, to outline the Office's current views and proposals on the various revision issues; and third, and most importantly, to present and explain model statutory language for a new section 108. Although the model statutory language should not be seen as the Office's final view on section 108, the Office believes that it is important to provide a more concrete framework for further discussion. Additionally, the Discussion Document includes copious illustrative examples of how the Office envisions the proposals might work in practice.

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<sup>1</sup> See, e.g., Statement of the Library Copyright Alliance on the Copyright Office's Notice of Inquiry Concerning Section 108 of the Copyright Act (June 16, 2016), [www.librarycopyrightalliance.org/storage/documents/108noiopposition2.pdf](http://www.librarycopyrightalliance.org/storage/documents/108noiopposition2.pdf); Society of American Archivists, Statement on U.S. Copyright Office Draft Revision of Section 108: Library and Archives Exceptions in U.S. Copyright Law [Docket No. 2016-4] (July 7, 2016), <https://www2.archivists.org/statements/saa-statement-on-draft-revision-of-section-108>. Note that the Society of American Archivists was, until 2016 fully supportive of efforts to revise section 108. See *Issue Brief: Archivists and Section 108 of the Copyright Act*, SOC'Y OF AM. ARCHIVISTS (May 2014), <https://www2.archivists.org/statements/issue-brief-archivists-and-section-108-of-the-copyright-act> (arguing that section 108 "should be updated to reflect [the] reality of the digital world").

The Office intends that the Section 108 Discussion Document will serve as a basis for future discussions with interested parties and with Congress, and help to develop greater consensus on proposed changes to section 108. As will be discussed in detail below, the Office's model statutory language provides a wide range of practical benefits to libraries, archives, and museums in addition to much needed stability. The proposed changes expand the exceptions applicable to libraries and archives in many ways, including covering museums, adding exceptions for public performance and display, allowing multiple preservation copies, allowing preservation copies of published works, expanding access to digital preservation copies, amending the subsection 108(i) exclusions for copies made at the request of users, allowing more flexibility in making preservation copies of works covered by licensing or purchase agreements, and allowing the use of third-party vendors in some situations. Because the scope of the proposed exceptions is so significant, the Office is also proposing that beneficiary institutions meet additional eligibility criteria, which should place only minimal burdens on bona fide libraries, archives, and museums. We also hope the Discussion Document is useful in generating concrete language on discrete issues within the overall section 108 review.

The model statutory text highlights the following proposals for revising section 108:

*Organization and Scope*

- Reorganize section 108 to make it easier to understand and apply in practice;
- Add museums to the statute in order to increase the reach of section 108 and ensure that more works can be preserved and made available to scholars and researchers;
- Add exceptions to the rights of public display and performance where appropriate; and
- Add common-sense conditions for libraries, archives, and museums to meet in order to be eligible for section 108 coverage, so as to balance the significant expansion of the exceptions.

*Preservation, Research, and Replacement Copies*

- Replace the current published/unpublished distinction with a new publicly disseminated/not publicly disseminated distinction, to better reflect the ways in which commercialized works are made available;
- Allow preservation copies to be made of all works in an eligible entity's collections, with expanded access for copies of works that were not disseminated to the public, a "dark archive" for publicly disseminated works, and replacement of the three-copy limit with a "reasonably necessary" standard;



- Expand the limits of what is allowed to be copied for research use in another institution, and replace the three-copy limit with a limit of what is “reasonably necessary” to result in a single end-use copy; and
- Add “fragile” to the list of conditions that may trigger a replacement copy, expand off-premises access for replacement copies, and replace the three-copy limit with a limit of what is “reasonably necessary” to result in a single end-use copy.

#### *Copies for Users*

- Clarify that digital distributions, displays, and performances are allowed to be made of copies made at the request of users, under certain conditions;
- Add a requirement for copies for users of an entire work or a substantial part of a work, that not only must a usable copy of the work not be available for purchase, but the user must not be able to license the use of the work; and
- Eliminate the exclusion of musical works; pictorial, graphic, or sculptural works; and motion pictures or other audio-visual works from the provisions permitting copies to be made at the request of users, under certain conditions.

#### *Audio-visual News Programs, Last 20 Years of Protection, and Unsupervised Reproducing Equipment*

- Expand the means through which copies of audio-visual news programs may be distributed;
- Expand the provision concerning exceptions in the last 20 years of copyright protection to cover all works, not only published works; and
- Clarify that the limitation of liability for patron use of unsupervised reproducing equipment includes equipment brought onto the premises by users, such as smart phones and portable scanners, and require copyright warnings be posted throughout the institution’s public areas.

#### *Licenses and Outsourcing*

- Provide that eligible institutions do not infringe a work if they make preservation or security reproductions in violation of contrary, non-bargained-for, contractual language; and
- Allow eligible institutions to contract with third parties to perform any of the reproduction functions under section 108, under specific conditions.

After some background information and a review of the current status of section 108, the Discussion Document details the changes proposed in the Model Statutory Language, as well as provides examples of how the new provisions might work in practice.

## II. BACKGROUND

### A. Brief History of Section 108

Congress enacted section 108 as part of the Copyright Act of 1976, with only limited updates since then through the Digital Millennium Copyright Act (DMCA) and the Copyright Term Extension Act (CTEA) in 1998. The impetus for the development of legislative rules governing uses of copyrighted works by scholarly and cultural institutions stretches back, however, to the 1930s, which saw the advent of widely available photographic reproduction technology for print works. In order to solidify the legal ability of scholars to obtain single, non-commercial copies of textual works from libraries, archives, museums, or similar institutions, in 1935 a group of researchers and publishers devised the “Gentlemen’s Agreement.”<sup>2</sup> This limited and non-binding agreement served as an acceptable standard of practice for scholars, librarians, and publishers for decades.<sup>3</sup> The Gentleman’s Agreement allowed an institution to make a single copy of a part of a book or periodical available to a scholar who represented in writing that he or she needed the copy solely for research purposes.<sup>4</sup> The source institution had to warn the scholar that he or she was still liable for infringement for any subsequent unauthorized use of the copy, and the source institution could not realize a profit from making the copy.<sup>5</sup>

The Gentlemen’s Agreement was soon joined by other professional guidelines, notably the American Library Association’s 1941 “Reproduction of Materials Code”<sup>6</sup> and 1952 “General Interlibrary Loan Code.”<sup>7</sup> All of these guidelines, along with more informal professional practices and court decisions on fair use, were the policy tools relied upon by libraries, archives, and museums prior to the enactment of section 108.

While the Gentlemen’s Agreement and its progeny seemed to work well in the early days of photo duplication, the development of high-speed photocopying by 1960 strained the comity that previously existed among researchers, publishers, and libraries. Disputes arose about who should be able to freely copy materials, how much, and under what restrictions.

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<sup>2</sup> *The “Gentlemen’s Agreement” of 1935*, in *REPROGRAPHY AND COPYRIGHT LAW* 157, 157–58 (Lowell H. Hattery & George P. Bush eds., 1964). For a detailed look at the origins of the Gentlemen’s Agreement, see Peter B. Hirtle, *Research, Libraries, and Fair Use: The Gentlemen’s Agreement of 1935*, 53 J. COPYRIGHT SOC’Y U.S.A. 545 (2006).

<sup>3</sup> See REPORT OF THE REGISTER OF COPYRIGHTS: LIBRARY REPRODUCTION OF COPYRIGHTED WORKS (17 U.S.C. 108) 7 (1983), available at <https://www.copyright.gov/reports/library-reproduction-1988.pdf>.

<sup>4</sup> See *The “Gentlemen’s Agreement” of 1935*, in *REPROGRAPHY AND COPYRIGHT LAW* 157, 157 (Lowell H. Hattery & George P. Bush eds., 1964).

<sup>5</sup> See *id.*

<sup>6</sup> See A.L.A. News - *Reproduction of Materials Code*, 35 A.L.A. BULL. 84 (1941).

<sup>7</sup> See *General Interlibrary Loan Code*, 13 C. & RES. LIBR. 350 (1952); Louis Charles Smith, *The Copying of Literary Property in Library Collections*, 46 L. LIBR. J. 197, 205–06 (1953) (discussing the Code and its basis in the Gentlemen’s Agreement).

Beginning with a 1959 study by the Copyright Office on library photocopying, policy makers began to discuss the idea of adding specific exceptions to the copyright law in order to address this issue.<sup>8</sup> When the Register of Copyrights recommended a statutory exception for library photocopying in 1961,<sup>9</sup> both authors and libraries greeted the idea with disdain.<sup>10</sup> A similar 1963 section of a draft copyright reform bill drew similar reactions.<sup>11</sup> Until 1967, in fact, publishers, authors, and libraries all opposed photocopying legislation, preferring instead to rely on their (markedly divergent) views of fair use.<sup>12</sup> And, even when the various parties agreed that some form of legislation was needed, sharp disagreements remained over what shape it should take.<sup>13</sup> Throughout the late 1960s and early 1970s, Congress held several hearings and produced numerous draft bills, with the final hurdle being how to address copying for interlibrary loan.<sup>14</sup> Ultimately, libraries, publishers, and authors reached an acceptable if not perfect compromise in 1976, and section 108 was enacted along with the rest of the omnibus Copyright Act of 1976.<sup>15</sup>

## B. Current Provisions of Section 108

Section 108's exceptions have remained essentially unchanged since the provision was enacted in 1976, with the only significant amendments coming in 1998 with the Digital Millennium Copyright Act (DMCA)<sup>16</sup> and Copyright Term Extension Act (CTEA).<sup>17</sup>

Section 108 begins by setting forth several conditions libraries and archives must meet in order to take advantage of the exceptions.<sup>18</sup> Copies made under section 108 may not be for

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<sup>8</sup> Borge Varmer, *Study No. 15: Photoduplication of Copyrighted Material by Libraries* (1959), in STAFF OF S. COMM. ON THE JUDICIARY, 86TH CONG., COPYRIGHT LAW REVISION: STUDIES PREPARED FOR THE SUBCOMM. ON PATENTS, TRADEMARKS, AND COPYRIGHTS OF THE COMM. ON THE JUDICIARY, UNITED STATES SENATE: STUDIES 14–16 (Committee Print 1960), available at <https://www.copyright.gov/history/studies/study15.pdf>.

<sup>9</sup> REPORT OF THE REGISTER OF COPYRIGHTS ON THE GENERAL REVISION OF THE U.S. COPYRIGHT LAW, 25–26 (1961), available at [https://www.copyright.gov/history/1961\\_registers\\_report.pdf](https://www.copyright.gov/history/1961_registers_report.pdf).

<sup>10</sup> See, e.g., STAFF OF H. COMM. ON THE JUDICIARY, 88TH CONG., COPYRIGHT LAW REVISION PART 2: DISCUSSION AND COMMENTS ON REPORT OF THE REGISTER OF COPYRIGHTS ON THE GENERAL REVISION OF THE U.S. COPYRIGHT LAW 256 (1963) (written statement of the Authors League of Am.); *id.* at 34–35 (statement of William H. Hogeland Jr., Joint Libr. Comm. on Fair Use in Photocopying).

<sup>11</sup> See REPORT OF THE REGISTER OF COPYRIGHTS: LIBRARY REPRODUCTION OF COPYRIGHTED WORKS (17 U.S.C. 108) 20–21 (1983).

<sup>12</sup> See Mary Rasenberger & Christopher Weston, *Overview of the Libraries and Archives Exception in the Copyright Act: Background, History, and Meaning* 10–16, in SECTION 108 STUDY GROUP, THE SECTION 108 STUDY GROUP REPORT app. K, K165–K171 (2008) (“STUDY GROUP REPORT”).

<sup>13</sup> See *id.* at K173–K176.

<sup>14</sup> See *id.* at K172–K177.

<sup>15</sup> See *id.* at K176–K177.

<sup>16</sup> Digital Millennium Copyright Act, § 404, Pub. L. No. 105-304, 112 Stat. 2860, 2876 (1998).

<sup>17</sup> Sonny Bono Copyright Term Extension Act, § 104, Pub. L. No. 105-298, 112 Stat. 2827, 2829 (1998).

<sup>18</sup> Note that the terms “library” and “archives” are not defined in section 108 or section 101.

“direct or indirect commercial advantage,”<sup>19</sup> and the collections of an eligible institution must be open to the public or to unaffiliated researchers in a specialized field.<sup>20</sup> Furthermore, all copies must include either the copyright notice that appeared on the source work, or, in absence of such a notice, a statement that the work may be protected by copyright.<sup>21</sup>

Section 108, broadly speaking, establishes exceptions to a copyright owner’s exclusive rights of reproduction and distribution for preservation, security, deposit in another institution, replacement, access by users, and use of duplication equipment.

Section 108’s exceptions for preservation and security reproduction apply solely to unpublished works in the collection of a library or archives.<sup>22</sup> Libraries and archives may make three copies of a work for these purposes—increased from one copy by the DMCA—and if the copy is in a digital format it must stay in the institution’s physical premises, another DMCA change.<sup>23</sup> The same conditions apply to making a copy of a work to deposit for research use in another library or archives: it must be unpublished, only three copies may be made, and off-premises access to digital copies is prohibited.<sup>24</sup>

The section 108 exception for making replacement copies applies only to published works.<sup>25</sup> Once again, there is a three-copy limit and digital copies cannot be made available outside the physical premises of the institution.<sup>26</sup> Replacement copies cannot be made unless the copy being replaced is damaged, deteriorating, lost, stolen, or in an obsolete format.<sup>27</sup> Once one of these preconditions is satisfied, the library or archives must first make a reasonable effort to determine whether an unused copy can be purchased at a fair price. If it can, no replacement copying is permitted.<sup>28</sup>

Section 108 also allows libraries and archives to make copies of published or unpublished works upon the request of their users, with the conditions varying depending

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<sup>19</sup> 17 U.S.C. § 108(a)(1).

<sup>20</sup> 17 U.S.C. § 108(a)(2).

<sup>21</sup> 17 U.S.C. § 108(a)(3).

<sup>22</sup> 17 U.S.C. § 108(b).

<sup>23</sup> See S. REP. NO. 105-190, at 61–62 (1998).

<sup>24</sup> 17 U.S.C. § 108(b).

<sup>25</sup> 17 U.S.C. § 108(c). Unlike the provision for preservation, security, and deposit for research in another institution, the replacement provision does not require that the work be in the collection of the library or archives making the copy.

<sup>26</sup> 17 U.S.C. § 108(c).

<sup>27</sup> 17 U.S.C. § 108(c). “[A] format shall be considered obsolete,” says the statute, “if the machine or device necessary to render perceptible a work stored in that format is no longer manufactured or is no longer reasonably available in the commercial marketplace.” *Id.*

<sup>28</sup> 17 U.S.C. § 108(c)(1).

upon whether the institution is copying a chapter or small part of a work, or an entire work or substantial part of a work.<sup>29</sup> In both instances, the source copies must be in the collection of the library or archives where the user makes his or her request, or in the collection of another library or archives,<sup>30</sup> and the library or archives must have no notice that the copy will be used for anything but private study, scholarship, or research, among other conditions.<sup>31</sup> Additionally, copies for users cannot be made from musical works; pictorial, graphic, or sculptural works; or motion pictures or other audiovisual works.<sup>32</sup> When a user requests a copy of an entire work or a substantial part thereof, the library or archives must first make a reasonable effort to determine whether a copy can be obtained at a fair price.<sup>33</sup> If it can, then no copy is allowed to be made.<sup>34</sup>

Copies for users are further conditioned by the rule that a library or archives cannot knowingly engage in the related or concerted reproduction or distribution of the same material.<sup>35</sup> To illustrate this condition, the 1975 Senate Report to the Copyright Act of 1976 explained “if a college professor instructs his class to read an article from a copyrighted journal, the school library would not be permitted . . . to reproduce copies of the article for the members of the class.”<sup>36</sup> Furthermore, as regards copies of articles or of small parts of larger works, “systematic” reproduction or distribution is prohibited, with the understanding that this condition does not bar those interlibrary loan arrangements that do not “substitute for a subscription to or purchase of” the work in question.<sup>37</sup>

Section 108 also addresses the scope of copyright infringement liability for libraries and archives, as well as for their patrons, in the area of independent user copying. Libraries and archives and their employees are immune from liability for patron use of unsupervised reproducing equipment located on the premises of the institution, provided that such equipment bears a notice warning patrons that their reproduction activities may subject them to

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<sup>29</sup> 17 U.S.C. §§ 108(d)–(e).

<sup>30</sup> *Id.*

<sup>31</sup> 17 U.S.C. §§ 108(d)(1), (e)(1).

<sup>32</sup> 17 U.S.C. § 108(i).

<sup>33</sup> 17 U.S.C. § 108(e).

<sup>34</sup> *Id.*

<sup>35</sup> See 17 U.S.C. § 108(g)(1).

<sup>36</sup> S. REP. NO. 94-473, at 70 (1975).

<sup>37</sup> 17 U.S.C. § 108(g)(2). Guidelines establishing how many copies of certain kinds of works a library or archives may receive per year under this proviso were developed by the National Commission on New Technological Uses of Copyrighted Works (CONTU), and published in the Conference Report for the Copyright Act of 1976. H.R. REP. NO. 94-1733, at 72–74 (1976) (Conf. Rep.), available at [https://www.copyright.gov/history/law/clgrev\\_94-1733.pdf](https://www.copyright.gov/history/law/clgrev_94-1733.pdf).

liability.<sup>38</sup> Additionally, a patron who uses a copy made upon request in ways that exceed the bounds of fair use becomes liable for copyright infringement.<sup>39</sup>

Section 108 includes an important provision stating that the exceptions do not affect the right of fair use.<sup>40</sup> This “fair use savings clause” allows libraries and archives to rely upon fair use to the same extent that any other user of a copyrighted work may.<sup>41</sup> The same provision instructs that nothing in section 108 affects any contractual provisions agreed to by a library or archives when obtaining a copy of a work, meaning that when the terms of a contract and the provisions of section 108 are in conflict, the contract terms prevail.<sup>42</sup>

Finally, in 1998, when the CTEA extended the U.S. copyright term for all works by twenty years, section 108 was amended to expand library and archives exceptions for any work in its last twenty years of protection, provided that the work is neither obtainable at a reasonable price nor being commercially exploited.<sup>43</sup>

### **C. Section 108 Revision Work to Date**

Just as the infancy of photo-duplication spurred the Gentleman’s Agreement, and the rise of rapid, publicly-accessible photocopiers gave impetus to the original section 108, the current ubiquity of digital media and technologies at all levels of creation, publication, preservation, and access is the animating reason behind more recent efforts by the Office to reconsider section 108. While changes were made to section 108 in 1998 to explicitly allow and condition the making of digital copies for preservation, security, deposit for research in another institution, and replacement,<sup>44</sup> these fell well short of the comprehensive revision necessary to reflect the explosion of technology in the digital era that followed.

Efforts by interested parties to address the effectiveness of section 108 in the rapidly changing digital environment began in earnest in the mid-2000s and continued for over a decade. In 2005, the Copyright Office, in partnership with the Library of Congress’s National Digital Information Infrastructure and Preservation Program, initiated an independent committee of distinguished and experienced librarians, copyright owners, archivists, academics, and other experts<sup>45</sup> to examine section 108 in light of digital technologies and “provide findings

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<sup>38</sup> See 17 U.S.C. § 108(f)(1).

<sup>39</sup> See 17 U.S.C. § 108(f)(2).

<sup>40</sup> See 17 U.S.C. § 108(f)(4).

<sup>41</sup> See discussions of fair use *infra* Sections III.B and IV.F.

<sup>42</sup> See 17 U.S.C. § 108(f)(4).

<sup>43</sup> Sonny Bono Copyright Term Extension Act, § 104, Pub. L. No. 105-298, 112 Stat. 2827, 2829 (1998); *see also* 17 U.S.C. § 108(h).

<sup>44</sup> See Digital Millennium Copyright Act, § 404, Pub. L. No. 105-304, 112 Stat. 2860, 2876 (1998).

<sup>45</sup> See *Members of the Section 108 Study Group*, SECTION 108 STUDY GROUP, <http://www.section108.gov/members.html>.

and recommendations on how to revise the copyright law in order to ensure an appropriate balance among the interests of creators and other copyright holders, libraries and archives in a manner that best serves the national interest.”<sup>46</sup> This “Section 108 Study Group” met regularly over a period of nearly three years and also held public roundtables<sup>47</sup> and solicited written comments<sup>48</sup> on select issues. The Study Group issued its final report in March 2008, in which it unanimously recommended several concrete amendments to section 108.<sup>49</sup> The Study Group Report also included discussions of those issues on which the members of the group could not come to a consensus whether or how to recommend specific changes to the statute.<sup>50</sup>

Members of the Study Group re-assembled at the Register of Copyright’s request in April 2012. During this meeting the Study Group members reviewed their 2008 conclusions and, in general, agreed that, while their recommendations were still valid, the Report did not go far enough, specifically in terms of revising the provisions governing copies made at users’ request. Additionally, in a preview of the issue that would loom large in subsequent discussions, the Study Group members discussed the increased reliance by libraries and archives on the doctrine of fair use in order to fulfill their missions.

In February 2013, the Copyright Office co-sponsored, with the Kernochan Center for Law, Media, and the Arts at Columbia Law School, an all-day public conference on section 108 revision. Entitled “Copyright Exceptions for Libraries in the Digital Age: Section 108 Reform,” the conference consisted of several panel discussions on topics such as the current landscape of similar exceptions in the United States and internationally, the recommendations of the Study Group, adjusting the scope of section 108, and whether and how mass digitization by libraries and archives should be permitted.<sup>51</sup>

The question of whether section 108 should be revised was addressed before Congress in 2014 and 2015 as part of the comprehensive copyright review process. On April 2, 2014, the House Subcommittee on Courts, Intellectual Property, and the Internet held a hearing on “Preservation and Reuse of Copyrighted Works,” where section 108 was one of the main topics,

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<sup>46</sup> STUDY GROUP REPORT at ii.

<sup>47</sup> For roundtable participants, topics, and transcripts, see [www.section108.gov/roundtables.html](http://www.section108.gov/roundtables.html).

<sup>48</sup> For a list of commenters and links to comments, see [www.section108.gov/comments.html](http://www.section108.gov/comments.html).

<sup>49</sup> See STUDY GROUP REPORT at iii–x. Each of the Study Group’s recommendations, and many of the other issues addressed in the Report, are referenced throughout this Discussion Document.

<sup>50</sup> See *id.* at 95–112 (discussing issues where the members of the Study Group agreed revision was necessary but could not come to unanimous agreement on how to amend the statute); *id.* at 113–24 (discussing issues where, some, but not all members thought revision was necessary).

<sup>51</sup> See Symposium, *Section 108 Reform*, 36 COLUM. J.L. & ARTS 527 (2013). The program and videos of the conference are available at *Section 108 Reform*, KERNOCHAN CTR. FOR L., MEDIA AND THE ARTS, <http://web.law.columbia.edu/kernochan/symposia/section-108-reform> (last visited July 20, 2017).



along with orphan works and mass digitization.<sup>52</sup> Prior to witness testimony, Judiciary Committee Chairman Bob Goodlatte noted that

[r]ecently some have suggested that instead of updating section 108 for the digital age, preservation activities should be covered by the fair use provisions of section 107. While it is probably true that there are clear-cut cases in which fair use would apply to preservation activities, fair use is not always easy to determine, even to those with large legal budgets. Those with smaller legal budgets or a simple desire to focus their limited resources on preservation may prefer to have better statutory guidance than exists today.<sup>53</sup>

Those witnesses who addressed section 108 disagreed over whether or not revision of the library and archives exception was either legally necessary or practically possible. For example, the co-chair of the Section 108 Study Group and an audiovisual conservation expert at the Library of Congress both testified that updating section 108 would bring significant benefit to the ability of libraries and archives to fulfill their preservation and user access missions.<sup>54</sup> However, one librarian-member of the Section 108 Study Group testified that the existing combination of “the specific library exceptions in section 108 with the flexible fair use right, works well for libraries and does not require amendment.”<sup>55</sup>

On April 29, 2015, then-Register of Copyrights Maria A. Pallante testified before the full House Judiciary Committee during a final copyright review hearing, which capped the formal congressional process. In addition to several other issues, Register Pallante identified library and archives exceptions as a topic ripe for legislative action. She explained that, in the Office’s opinion, “library exceptions . . . are outdated to the point of being obsolete . . . [and] it is our view that it is untenable to leave them in their current state.”<sup>56</sup> She noted that the Office would be preparing a discussion draft addressing structural and substantive changes to section 108.<sup>57</sup>

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<sup>52</sup> See *Preservation and Reuse of Copyrighted Works: Hearing Before the Subcomm. on Courts, Intellectual Prop., & the Internet of the H. Comm. on the Judiciary*, 113th Cong. (2014). The official transcript of the hearing is available at <https://judiciary.house.gov/wp-content/uploads/2016/02/113-88-87423.pdf>.

<sup>53</sup> *Id.* at 6 (opening statement of Rep. Goodlatte, Chairman, H. Comm. on the Judiciary).

<sup>54</sup> *Id.* at 31 (written statement of Richard S. Rudick, Co-Chair, Section 108 Study Grp.); *id.* at 11 (written statement of Gregory Lukow, Chief, Packard Campus for Audio Visual Conservation, Library of Cong.).

<sup>55</sup> *Id.* at 32 (statement of James G. Neal, Vice President for Info. Servs. and University Librarian, Columbia University).

<sup>56</sup> *Register’s Perspective on Copyright Review: Hearing Before the H. Comm. on the Judiciary*, 114th Cong. 5 (2015) (statement of Maria A. Pallante, Register of Copyrights and Director, U.S. Copyright Office), available at [https://judiciary.house.gov/wp-content/uploads/2016/02/114-22\\_94408.pdf](https://judiciary.house.gov/wp-content/uploads/2016/02/114-22_94408.pdf).

<sup>57</sup> See *id.* at 20–21 (written statement of Maria A. Pallante, Register of Copyrights and Director, U.S. Copyright Office) (stating that the discussion draft would “address museums, preservation exceptions and the importance of ‘web harvesting’ activities”).

To facilitate its development of an updated discussion draft document, in the summer of 2016 the Office held nearly forty in-person and telephone meetings with interested persons regarding possible updates to section 108, representing a wide variety of views, including libraries, archives, universities and law schools, authors, and other rightsholders.<sup>58</sup> The meetings were informal, allowing participants to speak as frankly as possible, and provided general information that helped to inform the Office’s present study. Some participants were opposed to opening up section 108 to revision, others supported the effort, and still others were somewhere in the middle, but all participants wanted to ensure that their views on what provisions should be revised, and, if so, how, were heard by the Office.

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<sup>58</sup> For a complete list of meeting participants, see <https://copyright.gov/policy/section108/summary.html>.

### III. CURRENT STATUS OF LIBRARY AND ARCHIVES EXCEPTIONS

#### A. The Digital Age

The rise of digital technologies has magnified significantly the outdated character of many of section 108's provisions. As the Section 108 Study Group described in detail in 2008, the very nature of embodying works in digital formats, whether a work is "born digital" or is converted to digital from analog, implicates copyright law in fundamentally new ways.<sup>59</sup> The most obvious difference between digital and analog media is that digital media cannot be perceived except through the intermediation of a machine.<sup>60</sup> And, in order to read or play or otherwise perform a digital work, machines need to copy it—copies that, even when incidental to the use and existing for a limited time, may still implicate copyright law.<sup>61</sup> Concomitantly with its lack of fit with digital media, section 108 as it presently stands fails to address current professional practices, business models, and user expectations that have grown up around digital technology. Most saliently for libraries, archives, and museums are the multiple copies—incidental and not—made as part of every use of digital media, as well as the multiple copies necessary for adequate preservation. As the Section 108 Study Group Report noted, "digital preservation requires the making and active management of multiple copies over time, stored in multiple locations, prior to deterioration and the loss of information."<sup>62</sup> Also, the increase in the electronic distribution and licensing of content may mean that more of the media available in cultural institutions is not actually owned by those institutions.<sup>63</sup> Moreover, the ease of reproduction and distribution made possible with digital technology, while a boon to cultural institutions and researchers, may present serious risks to copyright owners whose works reside in these institutions.<sup>64</sup>

None of these changes are sufficiently addressed by section 108, and while the increasing gaps in the law are sometimes filled in practice by reliance on fair use, as discussed below, a properly drafted and up-to-date statutory safe harbor would provide the certainty not inherent in fair use. To note just one example of where analog standards fail to meet digital

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<sup>59</sup> See STUDY GROUP REPORT at 5–7 (2008) (listing ten "key characteristics of digital works implicating copyright law").

<sup>60</sup> See *id.* at 6.

<sup>61</sup> See, e.g., *MAI Sys. Corp. v. Peak Computer, Inc.*, 991 F.2d 511 (9th Cir. 1993); *Stenograph L.L.C. v. Bossard Assocs., Inc.*, 144 F.3d 96, 101–02 (D.C. Cir. 1998); *Quantum Sys. Integrators, Inc. v. Sprint Nextel Corp.*, 338 F. App'x 329, 336–37 (4th Cir. 2009).

<sup>62</sup> STUDY GROUP REPORT at 44.

<sup>63</sup> See *Preservation and Reuse of Copyrighted Works: Hearing Before the Subcomm. on Courts, Intellectual Prop., & the Internet of the H. Comm. on the Judiciary*, 113th Cong. 52 (2014) (written statement of James G. Neal, Vice President for Info. Servs. and University Librarian, Columbia University) ("[m]any research libraries spend over 65% of their acquisition budgets on electronic resources.").

<sup>64</sup> See *id.* at 150 (written statement of Allan Adler, General Counsel and Vice President for Government Affairs, Ass'n of Am. Publishers (AAP)) (discussing "the potential for libraries to facilitate digital copy access, distribution and delivery in ways that pose the risk of market-harming unauthorized reproduction and distribution of publishers' works in the absence of appropriate preventive safeguards").

needs in the section 108 environment, currently section 108 prohibits digital transmission of preservation copies of unpublished works to anyone outside the library or archives for any reason.<sup>65</sup> This restriction prevents scholars from remotely accessing digitized documents, thus hampering the speed at which research advances and new works can be produced.<sup>66</sup> While many libraries and archives may well be comfortable with the risks involved in relying on fair use to make such a transmission, other actors may not have the resources—either monetary or legal—to do so, which seems to the Office to be an unreasonable burden, in contrast to a statutory change addressing this activity.

One final aspect of section 108 that requires amending is actually unrelated to digital technology—the statute’s drafting and organization.<sup>67</sup> While libraries and archives have certainly found ways to adapt to the confusing and often vague statute, these characteristics make it difficult to know for certain under what circumstances an entity’s activities are covered by the exceptions.

## **B. Fair Use**

Section 108’s fair use savings clause has always played an important role in supporting the preservation and access activities of libraries and archives. More recently, however, fair use has assumed increased importance as the statutory exceptions have grown more and more remote from actual library and archives practices. In its summer 2016 stakeholder meetings, for example, the Copyright Office heard many variations on the assertion that section 108 did not need to be revised because any gaps are easily and legally filled by fair use.<sup>68</sup> On one hand this is not an unreasonable result, and many libraries and archives are comfortable with this approach. Indeed, the savings clause itself was designed as an appropriate backstop to fill in potential legal gaps not addressed by the existing specific exception.<sup>69</sup> On the other hand,

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<sup>65</sup> See 17 U.S.C. § 108(b)(2) (articulating that “any such copy or phonorecord that is reproduced in digital format is not otherwise distributed in that format and is not made available to the public in that format outside the premises of the library or archives”).

<sup>66</sup> For an explanation of the Office’s approach to this problem, see section IV.C.1.c, *infra*.

<sup>67</sup> See STUDY GROUP REPORT ix (“Many practitioners find section 108’s organization confusing and are not always certain of the relationship among its provisions.”); *A Case Study for Consensus Building: The Copyright Principles Project: Hearing Before the Subcomm. on Courts, Intellectual Prop., & the Internet of the H. Comm. of the Judiciary*, 113th Cong. 15 (2013) available at [https://judiciary.house.gov/index.cfm?a=Files.Serve&File\\_id=C3DAFE7A-6F04-4CF6-8751-2010ECEEE1A9](https://judiciary.house.gov/index.cfm?a=Files.Serve&File_id=C3DAFE7A-6F04-4CF6-8751-2010ECEEE1A9) (statement of Laura N. Gasaway, Co-Chair, Section 108 Study Group) (“The current act is bewildering, to say the least, often even to copyright lawyers.”).

<sup>68</sup> See also *Preservation and Reuse of Copyrighted Works: Hearing Before the Subcomm. on Courts, Intellectual Prop. & the Internet of the H. Comm. of the Judiciary*, 113th Cong. 33 (2014) (statement of James G. Neal, Vice President for Info. Servs. and University Librarian, Columbia University) (“In addition to section 108, libraries rely upon fair use to perform a wide range of other completely noncontroversial practices. Libraries make preservation copies of musical works and motion pictures, categories not covered by 108. School libraries make multiple copies of appropriate portions of work for classroom use, not covered under section 108.”).

<sup>69</sup> See H.R. REP. NO. 94-1476, at 78 (1976) available at [https://www.copyright.gov/history/law/clrev\\_94-1476.pdf](https://www.copyright.gov/history/law/clrev_94-1476.pdf) (“Although subsection [(i)] generally removes musical, graphic, and audiovisual works from the specific exemptions

however, the ever-increasing reliance on fair use does not provide certainty to those who do not have the legal or monetary resources to analyze each potential fair use, or to litigate such uses if faced with infringement claims.

Reliance on fair use alone will leave libraries and archives without a robust, certain safe harbor for their essential, everyday activities. As the Society for American Archivists stated in 2014:

Section 108 has two great advantages over the fair use defense. First, Section 108 provides explicit assurance that certain actions are non-infringing. This clarity can encourage hesitant archivists who, because they are uncomfortable with their understanding of fair use or are unable to risk the cost of defending their understanding, needlessly limit public access to archival materials. Second, Section 108 authorizes some socially beneficial activities that may not constitute fair use, such as the copying of entire collections for deposit in other repositories.<sup>70</sup>

Currently, fair use jurisprudence does appear to explicitly support some of the digital reproduction activities that libraries and archives are engaged in, as in the *HathiTrust*<sup>71</sup> and *Google Books*<sup>72</sup> cases. Additionally, the principles announced in those cases and others have been leveraged in arguments for even broader fair use reliance by libraries.<sup>73</sup> But fair use remains a fact-based, case-by-case analysis, and there remain many essential library and archives activities that may not be authorized by fair use if they are not covered by section 108—specifically in the area of distribution of copies of works to users. For example, neither the *HathiTrust* nor the *Google Books* case addressed making full-text copies of any copyrighted work available to users outside the library premises, beyond *HathiTrust*'s allowance of access to users with print disabilities. Furthermore, there remain other activities where fair use may apply, but which have simply not been tested in court, such as exceeding the three-copy limit for preservation, research, or replacement copies, or making preservation copies of all categories of published

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of section 108, it is important to recognize that the doctrine of fair use under section 107 remains fully applicable to the photocopying or other reproduction of such works. In the case of music, for example, it would be fair use for a scholar doing musicological research to have a library supply a copy of a portion of a score or to reproduce portions of a phonorecord of a work.”).

<sup>70</sup> Issue Brief: *Archivists and Section 108 of the Copyright Act*, SOC’Y OF AM. ARCHIVISTS (May 2014), <https://www2.archivists.org/statements/issue-brief-archivists-and-section-108-of-the-copyright-act>.

<sup>71</sup> *Authors Guild Inc. v. HathiTrust*, 755 F.3d 87 (2d Cir. 2014) (finding that mass digitization of more than 20 million in-copyright works for purposes of full-text searching and access for people with print disabilities was fair use).

<sup>72</sup> *Authors Guild v. Google, Inc.*, 804 F.3d 202 (2d Cir. 2015) (holding that Google’s digitization of copyright-protected works from the collections of several libraries, creation of a search functionality, and display of snippets qualified as fair use), *cert. denied*, 136 S. Ct. 1658 (2016).

<sup>73</sup> See, e.g., Jonathan Band, What Does the *HathiTrust* Decision Mean for Libraries? 4–6 (2014), available at [www.librarycopyrightalliance.org/storage/documents/article-hathitrust-analysis-7jul2014.pdf](http://www.librarycopyrightalliance.org/storage/documents/article-hathitrust-analysis-7jul2014.pdf).

works. Resolution of many of these issues may therefore require long-term litigation that would be beyond or drain the resources of many smaller institutions.<sup>74</sup> It is important to note that the Copyright Office is not attempting here to argue whether fair use should or should not apply in any given situation, but instead to point out there are many circumstances in which a specific exception would provide greater certainty and require the investment of fewer resources.<sup>75</sup>

At the same time, the Office emphasizes that any revision of section 108 must include the current fair use savings clause without modification to ensure that fair use remains an important safety valve and is available to libraries and archives in situations not addressed by the text of section 108. Indeed, the Office would not recommend any legislation that did not include the fair use savings clause. Moreover, the Office is not, in this Discussion Document, taking a position on the precise contours of how the fair use savings clause should be interpreted by the courts as it relates to the allowances and conditions of the rest of section 108.

Finally, the Office is aware of a concern that updating section 108 would somehow, inadvertently, negatively impact libraries' and archives' ability to rely upon fair use—despite a clear savings clause. We do not believe that such an outcome is likely. The mere fact that section 108 has been revised in substantive ways will not have a legal impact on the savings clause and will not imperil its relationship to fair use in the future. Furthermore, the Office believes that the Second Circuit's 2014 holding that the savings clause means just what it says is unlikely to be undermined by changes to other parts of the statute.<sup>76</sup> In the Office's view, a carefully revised section 108 would provide a much more solid ground upon which to base the vitally important work of digital reproduction and access for scholars and for future generations.

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<sup>74</sup> For example, in a recent fair use case a university defendant was awarded \$2.86 million in attorneys' fees and \$85,746 in costs, indicating the amount of money spent on defending its use of copyrighted works. See *Cambridge Univ. Press v. Becker*, No. 1:08-cv-1425 (N.D. Ga. Aug. 10, 2012), available at [http://scholarworks.gsu.edu/cgi/viewcontent.cgi?article=1005&context=univ\\_lib\\_copyrightlawsuit](http://scholarworks.gsu.edu/cgi/viewcontent.cgi?article=1005&context=univ_lib_copyrightlawsuit). This award was overturned by the Eleventh Circuit, and the case is currently on remand to the district court. See *Cambridge Univ. Press v. Patton*, 769 F.3d 1232 (11th Cir. 2014).

<sup>75</sup> Cf. *Preservation and Reuse of Copyrighted Works: Hearing Before the Subcomm. on Courts, Intellectual Prop., & the Internet of the H. Comm. of the Judiciary*, 113<sup>th</sup> Cong. 25–26 (2014) (statement of Richard S. Rudick, Co-Chair, Section 108 Study Group) ("Libraries have come to rely heavily on fair use under section 107, in part because of the inadequacies of 108 in the digital era. But reliance on section 107 for purposes that go far beyond those originally conceived or imagined invites, as we have seen, expensive litigation with uncertain results.").

<sup>76</sup> See *Authors Guild, Inc. v. HathiTrust*, 755 F.3d 87, 94 n.4 (2d Cir. 2014).

#### IV. SPECIFIC ISSUES AND MODEL STATUTORY LANGUAGE DISCUSSION

As discussed above, now is an opportune time for an overhaul of section 108, in light of the changing technological and legal background, as well as Congress' focus on reviewing the Copyright Act. To accompany its Model Statutory Language for revising section 108 (see Appendix A), the Copyright Office below provides a brief guide to the substantive changes proposed in the Model. It also provides examples of how certain new provisions would be expected to operate in practice.

##### A. Eligibility

###### 1. Eligible Entities—Museums

The text of the current section 108 explicitly mentions only libraries and archives as eligible institutions that may take advantage of the privileges outlined in this section.<sup>77</sup> Libraries and archives, however, are not the only institutions that have the responsibility for the preservation and stewardship of the cultural heritage, carried out in part through reproduction, distribution, public display, and public performance of copyrighted works. Thus, the Model Statutory Language proposes adding museums as eligible entities for the purposes of section 108.<sup>78</sup>

*Example: The Forest Museum of Natural History charges a \$10 admission fee and abides by all of the section 108 conditions for eligibility and general requirements. It is eligible to take advantage of the section 108 exceptions.*

While a library or archives within a museum may currently take advantage of section 108 if that library or archives meets the eligibility requirements under subsection 108(a), the museum itself is not eligible for section 108. Adding museums as an eligible entity would ensure, among other things, that small museums that may not be associated with a library or archives could take advantage of the benefits of section 108. Whatever distinction between museums and libraries/archives that may have existed when drafting section 108<sup>79</sup> is no longer operative, as museums rely on reproductions of copyrightable material to support their mission

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<sup>77</sup> See 17 U.S.C. § 108(a).

<sup>78</sup> Model Statutory Language § 108(a).

<sup>79</sup> The 1935 Gentlemen's Agreement included museums, but museums were excluded from the library and archives exception added by the Copyright Act of 1976. The legislative history of the Copyright Act does not present any reasoning behind this omission. (The only reference in the legislative history to museums in the context of section 108 appears during the testimony of Barbara Ringer when she referred to the 1935 Gentlemen's Agreement. See *Copyright Law Revision: Hearing Before the Subcomm. on Courts, Civil Liberties, & the Admin. of Justice of the H. Comm. on the Judiciary, Part 3*, 94th Cong. 1795 (1975) (statement of Barbara Ringer, Register of Copyrights)). See also STUDY GROUP REPORT at 31–32 (discussing similarities among libraries, archives, and museums that warrant museums being covered under section 108).



of curating, studying, and sharing cultural heritage with the public.<sup>80</sup> The Study Group noted that “[i]n the digital world . . . there is no clear reason to differentiate among these types of collecting institutions in their ability to collect, preserve, display, and provide access to their collections.”<sup>81</sup> Moreover, stakeholders with whom the Copyright Office met in the summer of 2016 universally agreed on adding museums as an eligible entity.

Like the current section 108, the Model Statutory Language does not define museums, libraries, or archives.<sup>82</sup> In the past, courts have appropriately interpreted the meaning of “library” and “archives” in the context of section 108.<sup>83</sup> It is likely that courts would draw similar lines in interpreting “museums” within the proposed section 108 context.

## 2. Conditions for Eligibility

As stated in the previous section, neither section 108 nor the remainder of the Copyright Act defines a library or archives. In order to qualify for a section 108 exception, the particular institution must meet certain requirements outlined in subsection 108(a). Currently, subsection 108(a)(2) requires that an eligible library or archives be open to the public or that the collections of the relevant institution be available not only to researchers affiliated with that library or archives but also to other persons doing research in a specialized field.<sup>84</sup>

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<sup>80</sup> See *Museum Definition*, INT’L COUNCIL OF MUSEMS, <http://icom.museum/the-vision/museum-definition/> (“A museum is a non-profit, permanent institution in the service of society and its development, open to the public, which acquires, conserves, researches, communicates and exhibits the tangible and intangible heritage of humanity and its environment for the purposes of education, study and enjoyment.”) (last visited July 21, 2017).

<sup>81</sup> STUDY GROUP REPORT at 32–33.

<sup>82</sup> The Senate noted in the legislative history of the DMCA amendments to section 108 that the terms “libraries” and “archives” refer to institutions that “are established as, and conduct their operations through, physical premises in which collections of information may be used by researchers and other members of the public.” S. REP. NO. 105-190, at 62 (1998), available at <https://www.congress.gov/congressional-report/105th-congress/senate-report/190/1>. In 2008 the Study Group was unable to come to consensus on whether to recommend that libraries and archives that operate exclusively online (or “virtual-only libraries and archives”) should be explicitly covered by section 108 for several reasons, one being the paucity of such institutions at the time, and another being the difficulty of applying those exceptions that assume physical premises to entities that lack such premises. See STUDY GROUP REPORT at 113–16. Considering that we are nineteen years on from the DMCA and nine years on from the Study Group Report, the Copyright Office, while respectful of the Senate’s reasoning and the Study Group’s lack of consensus, feels that to require that libraries, archives, and museums must operate from physical premises would unduly handicap section 108. Thus, the Office is not proposing a “physical premises” requirement for libraries, archives, or museums in its Model Statutory Language.

<sup>83</sup> See *Pac. & S. Co., Inc. v. Duncan*, 744 F.2d 1490, 1494 n.6 (11th Cir. 1984) (finding that a commercial newspaper clipping service was not an “archive” within the context of section 108); *Elsevier, Inc. v. Comprehensive Microfilm & Scanning Serv., Inc.*, No. 3:10-CV-2513, 2013 WL 1497946, at \*8 (M.D. Pa. Apr. 10, 2013) (noting that there was a factual dispute as to whether the defendant’s microfilm scanning service or the institutions that provided print journals to such service could fall under the libraries or archives exception in section 108).

<sup>84</sup> 17 U.S.C. § 108(a)(2).



The Model Statutory Language proposes to retain this requirement and to add the following conditions of eligibility: (1) the institution has a public service mission; (2) the institution has trained staff or volunteers who provide professional services normally associated with a library, archives, or museum; (3) the institution's collections are composed of lawfully acquired and/or licensed materials; and (4) the institution implements reasonable digital security measures.<sup>85</sup> The library, archives, or museum seeking to take advantage of section 108's exceptions must meet all of these conditions. These additional eligibility rules seek to balance the expanded scope of permissible activities discussed later in this Discussion Document.

#### **a. Public Service Mission**

The "public service mission" requirement was initially recommended by the Section 108 Study Group.<sup>86</sup> In conjunction with the current condition of "open to the public" or to "research[ers] in a specialized field,"<sup>87</sup> this new condition aims to exclude solely privately-directed institutions from section 108 in order to ensure that the exception furthers the public policy goals of copyright.<sup>88</sup> However, requiring an eligible institution to have a "public service mission" would not exclude for-profit institutions as long as the aims and values of those institutions are directed to the public.<sup>89</sup>

*Example: The library at Louise University<sup>90</sup>, a for-profit university, provides access to its collections for students at Louise University and the local community in and surrounding the town of Farmington where Louise University is located. This is sufficient indicia of a public service mission to allow the library to be eligible to take advantage of section 108.*

#### **b. Trained Staff or Volunteers**

The proposed condition of "trained staff or volunteers [who] provide professional services normally associated with libraries, archives, or museums"<sup>91</sup> seeks to exclude the hobbyist or amateur collector from the section 108 exceptions. While not every institution has the resources to employ professional staff, incorporating trained *volunteers* as a condition for eligibility should allow smaller libraries, archives, and museums to take advantage of section 108. "Training" in the proposed language would not require a professional degree or

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<sup>85</sup> See Model Statutory Language § 108(a).

<sup>86</sup> See STUDY GROUP REPORT at 36.

<sup>87</sup> 17 U.S.C. § 108(a)(2).

<sup>88</sup> Cf., STUDY GROUP REPORT at 12.

<sup>89</sup> Note also that the activities of for-profit institutions must continue to meet the requirement of being conducted "without any purpose of direct or indirect commercial advantage." For further discussion, see section IV.A.3, *infra*.

<sup>90</sup> All names used in the examples are fictional.

<sup>91</sup> Model Statutory Language § 108(a)(3).

certification, but would entail the knowledge and skills necessary to carry out the activities of the library, archives, or museum, such as helping to manage the collections, answering questions from the public, or planning events.

*Example: The Madison Museum is staffed by both paid employees and by volunteers, both of whom are trained on how to help manage and preserve the museum's collections and assist museum visitors. This is sufficient for the museum to meet the requirement of having trained staff or volunteers.*

While neither the current text nor the Model Statutory Language dictate or outline every aspect of the reproduction and distribution of material, awareness of issues and knowledge regarding institutional practices<sup>92</sup> can guide the employee or volunteer who is reproducing and distributing copyrighted material. As section 108 fundamentally limits a rightsholder's exclusive rights, requiring that the person conducting such activities exercise discretion acquired during training supports the appropriate balance within section 108. Similarly, such a requirement would exclude entities that have amassed large collections of information and do not have a trained staff or volunteers to oversee the care and accessibility of the collection—in other words, do not behave in ways normally associated with libraries, archives, or museums.<sup>93</sup>

### **c. Lawfully Acquired and/or Licensed Materials**

The Model Statutory Language also includes the proposed eligibility requirement that the collections of the eligible institution be composed of “lawfully acquired and/or licensed materials.”<sup>94</sup> Initially proposed by the Study Group,<sup>95</sup> this requirement is aimed at ensuring that unlawfully acquired or infringing materials are not further duplicated and circulated under the guise of a copyright law exception. Permitting such activity would contradict the copyright principles supporting the section 108 exception.

*Example: The International David Bowie Library, a website that links to scans that others have made of newspaper and magazine articles about the late performer, cannot take advantage of section 108 because it neither owns the physical copies of the articles, nor has licensed their reproduction.*

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<sup>92</sup> Examples of institutional practices would be the interlibrary loan process, institutional copyright guidelines, and public access guidelines.

<sup>93</sup> Cf., STUDY GROUP REPORT at 35.

<sup>94</sup> Model Statutory Language § 108(a)(4).

<sup>95</sup> See STUDY GROUP REPORT at 34.

#### **d. Reasonable Digital Security Measures**

The addition of “reasonable digital security measures”<sup>96</sup> reflects the current activities of many eligible institutions, as understood by the Copyright Office based on its 2016 stakeholder meetings. In order to allow for sufficient flexibility and ability to adapt to current and future practices and technologies, this new requirement does not dictate specific security measures.<sup>97</sup> The Office believes that attempting to prescribe detailed digital security requirements tailored to each kind of use would result in an unduly burdensome requirement. Whether an institution’s particular digital security measure is “reasonable” will largely depend upon what measures other institutions of similar size and mission have adopted. The presence of this condition seeks to balance the Model Statutory Language’s provisions so that the expanded abilities to make, distribute, perform, and display digital copies are accompanied by safeguards against those copies being used to undercut functioning markets.

*Example: The public library of Springfield implements a security policy that includes authentication requirements for off-site access by users to its preservation copies of works not distributed to the public, as is the established standard for public libraries in its state at that point in time. This practice serves as a “reasonable digital security measure.”*

### **3. General Requirements**

The Model Statutory Language retains the general requirements pertaining to section 108 activities: that such activities be done without any purpose of direct or indirect commercial advantage,<sup>98</sup> and that all copies include the notice of copyright that appears on the source copy or a legend stating that the work may be protected by copyright, if no notice is found.<sup>99</sup> The Copyright Office is not aware of any objection to these general requirements.

The general requirement of no direct or indirect commercial advantage complements the proposed institutional eligibility requirements discussed in the previous section. While the prohibition of any direct/indirect commercial advantage addresses the institution’s activities and the public service mission speaks to the institution itself, these requirements together support the goal of section 108 to benefit the public and not to aid the profit-making of an institution.

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<sup>96</sup> Model Statutory Language § 108(a)(5).

<sup>97</sup> Cf., *A Case Study for Consensus Building: The Copyright Principles Project: Hearing Before the Subcomm. on Courts, Intellectual Prop., & the Internet on the H. Comm. of the Judiciary*, 113th Cong. 80 (2013) (statement of Rep. Jeffries, Member, H. Comm. on the Judiciary) (“[O]ne of the challenges, of course, we face is that, as the technology develops rapidly, we have to put into place statutes that accommodate the changing technology.”).

<sup>98</sup> 17 U.S.C. § 108(a)(1); Model Statutory Language § 108(b)(1).

<sup>99</sup> 17 U.S.C. § 108(a)(3); Model Statutory Language § 108(b)(2).

Despite the absence of a requirement for an eligible library, archives, or museum to demonstrate nonprofit status, the current and proposed conditions are intended to work together to prevent a purely commercial enterprise from forming a collection of copyrighted works and engaging in for-profit reproduction and distribution of those works. As the Study Group noted, “commercial entities rarely qualify under [the no direct or indirect commercial advantage] standard because it is difficult to separate their activities from some commercially advantageous purpose.”<sup>100</sup> Similarly, and consistent with the intent of Congress as expressed in the 1976 House Report, a nonprofit library, archives, or museum would not be able to contract with a commercial entity in order to authorize such commercial entity to reproduce or distribute copyrighted works for a commercial purpose, as the general requirements focus on the section 108 activities themselves and not the institution.<sup>101</sup>

## **B. Rights Affected**

The current section 108 generally only establishes exceptions to the rights of reproduction and distribution.<sup>102</sup> Section 108 also creates additional exceptions to the rights of public display or performance for published works in the last twenty years of their term for the purposes of preservation, scholarship, or research under certain conditions.<sup>103</sup> The Model Statutory Language retains the exceptions listed above, and adds exceptions for public display and public performance where appropriate, for a broader range of activities.<sup>104</sup> More specifically, the Model Statutory Language would permit eligible institutions to reproduce, distribute, publicly display, and publicly perform a single copy of an article, small part of a work, or an entire work upon request by a user.<sup>105</sup>

*Example: The Art Museum of Springfield makes a digital copy of a small part of an art film upon request of a patron. The Art Museum of Springfield may permit the patron to view the art film reproduction in a small viewing room at the Museum; it may also digitally distribute or perform this copy to the user directly or via interlibrary loan under certain conditions.*

The use of digital works and other types of media by eligible institutions does not implicate only reproduction and distribution but also public performance and display. As an

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<sup>100</sup> STUDY GROUP REPORT at 34.

<sup>101</sup> See H.R. REP. NO. 94-1476, at 74–75 (1976).

<sup>102</sup> See 17 U.S.C. §§ 108(b)–(e). Note, however, that there are no exceptions for purposes of copies for users (17 U.S.C. §§ 108(d)–(e)) for musical works; pictorial, graphic, or sculptural works; and motion pictures or other audiovisual works, with some exceptions. See 17 U.S.C. § 108(i).

<sup>103</sup> 17 U.S.C. § 108(h).

<sup>104</sup> Model Statutory Language § 108(a).

<sup>105</sup> Specific conditions would apply to the electronic distribution, performance, or display of copies or phonorecords of audio-visual or musical works for users, in that only one user may access such a work at a time, and only for a limited time. See Model Statutory Language §108(g); *infra* Section IV.D.

eligible institution under section 108 must be either open to the public or to nonaffiliated researchers, it is very likely that any performance or display by a library, archives, or museum to a member of its user community would be considered to be public, and thus may infringe a copyright holder's display and/or performance rights. Moreover, current provisions in the Copyright Act do not necessarily enable libraries, archives, and museums to clearly provide different types of digital access to a wide selection of their collections without first seeking permission. Subsection 109(c) permits an owner, such as a library, archives, or museum, of a "particular" copy of a work to display that copy.<sup>106</sup> However, this provision's application in the digital context is unclear as it refers to a "particular" copy and does not address the temporary copies necessary for the display of digital works.<sup>107</sup> Subsection 109(c) also does not cover public performance but only the right to display a particular work. Regarding the showing of motion pictures, for example, current library practice is to seek licenses when performing works in public meeting rooms, and to allow permission-free viewing only in private viewing rooms to individuals or "very small" groups.<sup>108</sup>

Similarly, display and performance rights may be implicated when eligible institutions seek to make works available via streaming.<sup>109</sup> Permitting streaming and other access methods to publicly available material that would implicate the public performance and display rights may also affect the market of some works, particularly those with commercial appeal. However, proposed market check requirements and other limitations in the context of such activities for commercial works would reduce any potential impact on the market.<sup>110</sup> Expanding section 108 activities to accommodate such rights responds to the methods of accessibility presently used by libraries, archives, and museums in the current digital context and promotes more opportunities for public access to a wider range of collection material.

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<sup>106</sup> See 17 U.S.C. § 109(c).

<sup>107</sup> See STUDY GROUP REPORT at 118.

<sup>108</sup> *Video and Copyright: ALA Library Fact Sheet Number 7*, AM. LIBRARY ASS'N (Oct. 2002), [www.ala.org/Template.cfm?Section=libraryfactsheet&Template=/ContentManagement/ContentDisplay.cfm&ContentID=24635](http://www.ala.org/Template.cfm?Section=libraryfactsheet&Template=/ContentManagement/ContentDisplay.cfm&ContentID=24635).

<sup>109</sup> See *Preservation and Reuse of Copyrighted Works: Hearing Before the Subcomm. on Courts, Intellectual Prop., & the Internet of the H. Comm. on the Judiciary*, 113th Cong. 12–17 (2014) (written statement of Gregory Lukow, Chief, Packard Campus for Audio Visual Conservation, Library of Congress); *id.* at 16 (same statement) ("Libraries and archives should . . . be allowed to . . . establish their own secure networks, to stream out-of-print recordings to researchers.").

<sup>110</sup> See *infra* Section IV.D.

**C. Copies for Preservation and Security, Deposit for Research in Another Eligible Institution, and Replacement**

**1. Preservation and Security Copies**

Under the current section 108, libraries and archives may make up to three copies of unpublished works that are already in their collections for preservation or security purposes.<sup>111</sup> If the unpublished works are converted to a digital format, they cannot be made available to the public outside the premises of the library or archives in that format.<sup>112</sup>

The Model Statutory Language recommends four changes in order for the preservation and security provisions to better match the combined digital/analog environment in which libraries, archives, and museums function. Collectively, these provisions strive to allow libraries, museums, and archives to provide adequate public access to the works in their collections while limiting circulation of copies so as not to interfere with an author's right of first publication.<sup>113</sup>

**a. "Dissemination to the Public" Instead of "Publication" as Distinguishing Factor**

The first change is the removal of "publication" as a distinguishing factor for how a work is treated. Instead, the Office's Model Statutory Language proposes that the determination of what a library, museum, or archive can do with a work should depend on whether the work has been lawfully disseminated to the public.<sup>114</sup>

With the rise of digital media and the internet, the distinction between published and unpublished, as legal terms of art, has become difficult to parse.<sup>115</sup> The new publicly disseminated/not publicly disseminated distinction, which would apply only to section 108, is more practical because it is easier to tell if a work has been disseminated to the public than if it

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<sup>111</sup> 17 U.S.C. § 108(b).

<sup>112</sup> *Id.*

<sup>113</sup> While not one of the exclusive rights set forth in section 106 of the Copyright Act, the right of first publication is the principle that an author is generally entitled to control when and where the first publication of his or her work takes place. *See, e.g.* 17 U.S.C. § 115(a)(1) (compulsory license available only "[w]hen phonorecords of a nondramatic musical work have been distributed to the public in the United States under the authority of the copyright owner"). For more on the right of first publication in the library and archives context, see STUDY GROUP REPORT at 62–63.

<sup>114</sup> Model Statutory Language § 108(c)(1).

<sup>115</sup> *See* 17 U.S.C. § 101 (defining "publication" as "the distribution of copies or phonorecords of a work to the public by sale or other transfer of ownership, or by rental, lease, or lending. The offering to distribute copies or phonographs to a group of persons for purposes of further distribution, public performance, or public display, constitutes publication. A public performance or display of a work does not of itself constitute publication.").

has met the technical definition of publication in the Copyright Act.<sup>116</sup> The change reflects the practical distinction between one-of-a-kind and mass produced works as well as capturing born-digital works. Focusing on public dissemination of the work also respects authors' intentions on the reach of and commercialization of their works. For a work to be considered "disseminated to the public," such dissemination must be with the authorization of the author or rights-holder.

*Examples: A television program broadcast over network television and available through on-demand streaming services but not sold to the public in physical copies would be considered "unpublished" under current section 108. Under the Model Statutory Language, this same program would be considered "disseminated to the public" and treated in a manner consistent with other commercial products.*

*A draft manuscript posted to a publicly accessible blog without the authorization of the author would not, however, be considered as disseminated to the public, as its dissemination was accomplished without the author's knowledge or permission.*

#### **b. Allowance for Number of Copies Reasonably Necessary Rather Than Three-Copy Limit**

The three-copy limit under the current section 108 was a DMCA amendment intended to address the need to make digital copies and was based on microfilm preservation practices.<sup>117</sup> Making a single end-use digital copy, however, may require making more than three copies in the process. Librarians and archivists currently rely on fair use to cover the making of additional copies, including temporary, incidental copies. In this respect, the suggested change brings the provision in line with actual practice and avoids the problem of libraries and archives having to engage in a time-consuming fair use analysis each time they want to make more than three copies of a work.

Additionally, the change to "as reasonably necessary" allows institutions to determine when a preservation or security copy needs to be made and allows institutions to make multiple back-up copies of digital works, in line with recommended best-practices for digital preservation.<sup>118</sup>

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<sup>116</sup> It is important to note that the proposed distinction would maintain the rule under 17 U.S.C. § 101 that public performance or public display of a work does not constitute publication of that work. While "publicly disseminated" includes works that have been published, it does not equate to publication.

<sup>117</sup> S. REP. NO. 105-190, at 61–62 (1998); *see also* STUDY GROUP REPORT at 19.

<sup>118</sup> *See, e.g., Preservation Principles*, LOCKSS, <https://www.lockss.org/about/principles/> (last visited July 19, 2017) (recommending making several copies in an effort to maintain decentralized and distributed preservation over a shared network); CAL. STATE LIBRARY, CALIFORNIA STATE LIBRARY DIGITAL PRESERVATION POLICY 3 (2016) (listing "migrate and change the format of digital materials to formats suitable and acceptable for long-term preservation and access, when necessary" as an objective).

*Examples: A library copies a monograph for preservation so that it is accessible with current computer software on the library's system. As technology changes and new software for reading text becomes prevalent, the monograph may be re-copied so that it is perceptible, as well as to migrate it to a more stable platform. The library does not have to keep track of the number of times it re-copies the monograph.*

*A film archive wishes to make a preservation copy of an 8mm film reel in the most-current digital format. The process of creating the digital copy involves the making of many temporary copies in the process. Under the current section 108, the archivist relies on fair use to cover the in-process copies. Under the Model Statutory Language, these additional copies are already covered and fair use need not be relied upon for this purpose.*

**c. Access to Preservation and Security Copies of Works Not Disseminated to the Public**

The Model Statutory Language clarifies the practices around lending copies made for preservation or security. The current section 108 only explicitly addresses reproductions in digital format and prohibits public access to all digital reproductions outside library premises, regardless of storage media.<sup>119</sup> The Study Group vigorously debated the question of providing remote access to digital preservation copies of unpublished works, and its Report presented contrasting arguments for and against such access.<sup>120</sup> The Model Statutory Language contains three ways in which preservation or security copies of works not disseminated to the public can be accessed. First, all such copies can be made available on the premises of the institution.<sup>121</sup> This on-premises access may include public display of works in exhibits or public performances. Second, those copies housed in physical media may be lent to users for off-site use.<sup>122</sup> Third, digital copies of such works not held in physical formats may also be accessed for a limited time off-site by a single user at a time, for a limited time.<sup>123</sup>

The librarians, rightsholders, and other stakeholders who spoke with the Copyright Office in the summer of 2016 were in broad agreement about the importance of access to preservation copies. In the Model Statutory Language, the need for access to copies of works that were not disseminated to the public is balanced against concerns of enabling unauthorized duplication beyond the eligible institution by limiting off-site electronic access to one user at a time, for a limited time, using reasonable digital security measures. Increased public access to digital preservation copies of works not disseminated to the public is also consistent with digital

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<sup>119</sup> 17 U.S.C. § 108(b)(2).

<sup>120</sup> See STUDY GROUP REPORT at 66–68.

<sup>121</sup> Model Statutory Language § 108(c)(1)(A).

<sup>122</sup> Model Statutory Language § 108(c)(1)(B).

<sup>123</sup> Model Statutory Language § 108(c)(1)(C).



preservation best practices, which discourage “dark archiving”<sup>124</sup> because digital files that are not routinely accessed may develop problems that go unremedied.<sup>125</sup>

The Model Statutory Language purposefully does not define the term “premises.” “Premises” may be conceptualized in a variety of ways. For example, for a local library that only allows access to its collections within its building, “premises” may mean the physical premises of the library. For a university with a network of libraries serving students across campus and a campus-wide intranet that grants access to the libraries’ digital holdings, “premises” may be thought of as the boundaries of the entire campus rather than as each individual library building. For a public library with extensive digital holdings accessible by anyone with a library-granted log-in, “premises” may mean the digital network through which the collections may be accessed.<sup>126</sup> The Copyright Office recognizes that restricting “premises” to physical buildings in section 108 may be a concept that needs to be re-thought, and offers the above scenarios as possible alternatives.

*Example: The unpublished letters of a famous composer have been given to a research library, with no guidance on how they may be copied or shared. The library, under current section 108, may create digital preservation copies of these letters, but must restrict public access to the premises of the library. Under the Model Statutory Language, the library may make the letters available remotely to a single user at a time, for a limited time. Should other users seek remote digital access to the letters, they will have to wait until the first user’s time limit expires.*

#### **d. Preservation and Security Copies May Be Made of Works Disseminated to the Public**

Under the existing section 108, only unpublished works can be copied for preservation or security purposes. However, there are instances in which a preservation copy of a published work may be necessary, such as when that work is out-of-print or is orphaned.<sup>127</sup> By allowing copies to be made of works disseminated to the public, the Model Statutory Language allows preservation copies to be made of all works that may need to be preserved, regardless of original commercial purpose.

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<sup>124</sup> “Dark archives” are “a collection of materials preserved for future use but with no current access.” *Dark Archives*, SOC’Y OF AM. ARCHIVISTS, <http://www2.archivists.org/glossary/terms/d/dark-archives> (last visited September 14, 2017).

<sup>125</sup> See STUDY GROUP REPORT at 44 (noting the need for “periodically checking, refreshing, and replicating” digital materials).

<sup>126</sup> The Office recognizes that such a conceptualization of “premises” would blur the line between on-premises and remote access, perhaps requiring new access conditions.

<sup>127</sup> An orphan work is one where the copyright owner cannot be identified or located. More information on the orphan works issue is available in the Office’s 2015 report *Orphan Works and Mass Digitization*, available at <https://www.copyright.gov/orphan/reports/orphan-works2015.pdf>.

The change in allowing preservation and security copies of works disseminated to the public is not intended to allow perpetual creation of replacement copies for the collection. There are different provisions for addressing replacement copies, discussed in detail below. Preservation copies of publicly disseminated works may only be accessed on the premises by employees.<sup>128</sup>

The Study Group recommended adding an exception that would allow preservation copies of publicly disseminated works, which it viewed as “a significant gap in [the current] section 108.”<sup>129</sup> This recommendation included the “reasonably necessary” limit on the number of copies and the access restrictions incorporated in the Model Statutory Language.<sup>130</sup> It also included two additional elements: 1) the original item would need to be considered “at risk” and 2) the institution making the copy would need to be a “qualified” institution.<sup>131</sup> The Model Statutory Language does not incorporate these two elements of the Study Group’s recommendation.

The Study Group reasoned that “there is insufficient need for libraries or archives to make preservation copies of published or publicly disseminated copyrighted works where there is no evidence of any significant risk of loss, such as for works readily available on the market.”<sup>132</sup> However, it is the institutions themselves that are best positioned to decide if a work needs to be preserved, and there may be circumstances as yet unforeseen that would require “insurance” replacement copies for currently available works. The Model Statutory Language addresses the concerns about using preservation copies to replace available market copies through the limitation on access of the preservation copy to institution employees and through the preservation copy’s interactions with other provisions of section 108. For example, the Copyright Office envisions that a preservation copy of a work disseminated to the public may be used as a source for a replacement copy (e.g., a copy or phonorecord made to replace an item in an institution’s collections that is damaged, deteriorating, lost, stolen, or in an obsolete format); however, making replacement copies of works disseminated to the public requires a market check, as explained below,<sup>133</sup> and this additional step will prevent replacement copies being made for popular and available works.

The Study Group’s reasons for including a list of special qualifications for institutions to preserve publicly disseminated works had to do with concerns about an institution’s ability, in terms of resources and expertise, to “actively engage in comprehensive preservation of works”

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<sup>128</sup> Model Statutory Language § 108(c)(2).

<sup>129</sup> See STUDY GROUP REPORT at 69–70.

<sup>130</sup> See *id.* at 69.

<sup>131</sup> See *id.* at 69.

<sup>132</sup> See *id.* at 71.

<sup>133</sup> See *infra* Section IV.C.3.

and to “maintain adequate security with respect to the copies.”<sup>134</sup> The first of these concerns is addressed by subsection (l) in the Model Statutory Language allowing third party providers to handle the making of preservation copies in circumstances where the eligible institution lacks the capacity.<sup>135</sup> The second concern is addressed by the requirement in subsection (c)(2) of the Model Statutory Language that limits access to the preservation copies of publicly disseminated works to employees of the eligible institution on the premises of that institution. Compliance with this provision will, of course require maintaining adequate digital security measures as proposed in section 108(a)(5) of the Model Statutory Language.

*Example: A public library wishes to make a preservation copy of a book from the 1950s. The book is not yet deteriorating or fragile but is borrowed frequently from the library. Under the current section 108, the library must wait until the book is damaged or deteriorating to make a replacement copy. Under the Model Statutory Language, the library may make a preservation copy now from which future replacement copies may be made if the requirements of the replacement provision are met.*

## **2. Copies for Deposit for Research Use in Another Institution**

Copies made for deposit for research use in another institution are treated the same as preservation and security copies under the current section 108. However, preservation or security and research use in another institution are different purposes that are handled differently by librarians and raise different concerns for rightsholders (noted below). The Model Statutory Language seeks to address this by separating the conditions for creating a copy for deposit for research use in another institution from the conditions for creating a preservation or security copy.

The Office understands that the instances when copies are most likely to be deposited in another institution are when collections are divided between institutions and the making of research copies will allow one or more of the institutions to offer access to the complete collection.<sup>136</sup> Under the current section 108, only unpublished works may be copied for deposit for research in another institution, and the copying institution may make no more than three copies.<sup>137</sup> The Model Statutory Language makes three important changes: it allows copying of all works, with different restrictions for those disseminated to the public and those not disseminated to the public; it clarifies what users in the receiving institutions can do with the copies; and, it changes the permitted number of copies from a limit of three copies in total to a

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<sup>134</sup> STUDY GROUP REPORT at 73.

<sup>135</sup> See *infra* Section IV.G.5.

<sup>136</sup> STUDY GROUP REPORT at 65 n.120.

<sup>137</sup> 17 U.S.C. § 108(b).

limit of one end-use copy with the number of temporary, incidental copies limited only to what is reasonably necessary.<sup>138</sup>

**a. Deposit Copies of Works Not Disseminated to the Public May Be Accessed on Premises, Borrowed by Users, or Accessed Remotely**

Previously, the Office described its proposal to replace the current published/unpublished distinction in section 108 with the publicly disseminated/not publicly disseminated distinction. Under this new rubric, the differences in restrictions for use of copies deposited for research in another institution would be determined by whether or not the original work has been disseminated to the public.<sup>139</sup> For works not disseminated to the public, one end-use copy may be made and transferred to the receiving institution.<sup>140</sup> A limited number of temporary, incidental copies may be created as reasonably necessary to arrive at the one final copy.<sup>141</sup> The change from three copies total to one end-use copy is designed to better match the actual practice of librarians and the original intent of the three-copy limit, which was based on microfilm preservation practices.

Once made and transferred to the receiving institution, the copy of a work not disseminated to the public may be accessed on the premises of that institution.<sup>142</sup> Physical copies may also be lent off-premises.<sup>143</sup> Copies in digital formats not on physical media may be accessed by users remotely for a limited time by one user at a time.<sup>144</sup> These parameters help increase access to works for researchers while guarding against usurping the author's right of first publication.

**b. Works Disseminated to the Public May Only be Copied for Deposit in Another Institution After a Market Check**

For works that have been disseminated to the public, an institution receiving a deposit copy for research from another institution must first expend reasonable effort to determine that a usable copy cannot be obtained at a fair price.<sup>145</sup> This requirement protects against library-

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<sup>138</sup> See Model Statutory Language § 108(d)(1).

<sup>139</sup> See *supra* Section IV.C.1.a.

<sup>140</sup> Model Statutory Language § 108(d)(1).

<sup>141</sup> Model Statutory Language § 108(f).

<sup>142</sup> Model Statutory Language § 108(d)(2)(A)(i).

<sup>143</sup> Model Statutory Language § 108(d)(2)(A)(ii).

<sup>144</sup> Model Statutory Language § 108(d)(2)(A)(iii).

<sup>145</sup> Model Statutory Language § 108(d)(1).

made copies becoming market replacements. Once a copy is made and transferred to the receiving institution, it may only be accessed on the premises.<sup>146</sup>

For both works publicly disseminated and those not publicly disseminated, copies made for deposit for research in another institution do not become part of the receiving institution's collection for the purposes of section 108, meaning they are not considered to be works in the collection for purposes of making further copies for any reason.<sup>147</sup> However, the copies may be used as sources for making replacements.<sup>148</sup> This is especially useful in situations where an original work that was not publicly disseminated is damaged or lost, and the original holding institution needs to make a copy to replace its original.

*Example: Library A has all but two books in a published series. Library B has the two books library A is missing. Library A has checked the market and found that one of the books is available used from a reseller but the other book is only available in a signed, collectible format for twenty times its original sale price. Under both current section 108 and the Model Statutory Language, library A must purchase a copy of the first book if the library would like to have the book accessible to its patrons. For the second book, under current section 108, library A cannot request a copy from library B. Under the Model Statutory Language, library A can request a copy of the second book from library B. Library A may make that copy available to users on the premises, as well as use it as a source copy for other libraries to use when making replacement copies.*

### 3. Replacement Copies

The suggested changes to the provisions on replacement copies are minor tweaks to allow the provisions to operate more effectively in the combined digital/analog environment found in most libraries, archives, and museums. These changes generally follow the recommendations of the Study Group.<sup>149</sup> There are four changes proposed in the Model Statutory Language: an adjustment to the number of copies allowed; the addition of "fragile" as a condition for making a replacement copy; clarification on the ability to lend physical formats outside the institution premises; and a broadening of the market check to require looking for "usable" replacements, not just "unused" replacements. The conditions for making a replacement copy apply only to works disseminated to the public in the Model Statutory Language in order to roughly mirror the current section 108's application only to published works.<sup>150</sup>

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<sup>146</sup> Model Statutory Language § 108(d)(2)(B).

<sup>147</sup> Model Statutory Language § 108(d)(2)(C).

<sup>148</sup> *Id.*

<sup>149</sup> See STUDY GROUP REPORT at 52.

<sup>150</sup> Model Statutory Language § 108(e).

Replacement copies are treated differently than preservation copies because they have different purposes. Replacement copies are meant to be substituted into the collection for the original item that is no longer in a suitable state for use or circulation. Preservation copies, on the other hand, are meant to be kept on-hand by the institution in the event that something happens to the original item in the collection.

**a. One End-Use Copy Allowed Instead of Three Total Copies**

As in other places throughout section 108, the Model Statutory Language changes the limitation of three total copies to a limitation of one end-use copy, thus allowing the necessary number of temporary, incidental copies.<sup>151</sup> Under the Model Statutory Language, what matters is that there is one end-use replacement copy, not how many copies were made in the process of producing or maintaining that copy.

**b. Conditions for Making a Replacement Copy**

The Model Statutory Language proposes that in order for replacement copies to be made, the original copy in the institution's collection must be damaged, deteriorating, lost, stolen, fragile, or in an obsolete storage format.<sup>152</sup> The addition of "fragile" to the current conditions in section 108 addresses the issue of certain formats, particularly digital formats, where any damage or deterioration can render the entire work inaccessible and unable to be copied.

*Example: A museum wants to make a replacement copy of the digital version of a film, which though it is not damaged, deteriorating, or in an obsolete storage format, is in a fragile condition since it is on an old hard drive. Under current section 108, the museum cannot make a replacement copy until the file or the hard drive on which it is stored is damaged, deteriorating, or obsolete. Under the Model Statutory Language, the museum may make a copy and replace the old hard drive with the new copy.*

**c. Physical Formats May Be Lent Off-Premises; Non-Physical Digital Formats May Only Be Accessed on Premises**

The current section 108 provision on replacement copies requires that a copy "reproduced in digital format is not made available to the public in that format outside the premises."<sup>153</sup> It does not address non-digital formats. In the Model Statutory Language, replacement copies in a physical format may be lent off premises if "the replacement copy is

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<sup>151</sup> Model Statutory Language § 108(e), (f).

<sup>152</sup> Model Statutory Language § 108(e)(1).

<sup>153</sup> 17 U.S.C. § 108(c)(2).

lent in the same manner as the original.”<sup>154</sup> Replacement copies in non-physical digital formats may only be accessed on the premises.<sup>155</sup>

The Model Statutory Language addresses concerns over how digital media is handled and strives to match how users see distinctions between different types of works. Instead of focusing on the “digital format” of the work, the Model Statutory Language focuses on “physical format” or “non-physical format.” This change from the storage type of the work to the tangibility of the copy aligns more with the distinctions users see and the way in which different formats are treated.

*Examples: A library lends mini-discs from its collection. Because mini-disc players are not readily available on the market, the library wishes to replace the mini-discs with a format accessible to users. The library checks the market for compact discs of the albums it has on minis-discs, but finds nothing available. The library copies the remaining mini-discs onto compact discs. Under the current section 108, the library cannot lend the compact discs because the sound recordings on the disc are now in a digital format. Under the Model Statutory Language, the compact discs may be lent in the same manner as the original mini-discs.*

*A library lends VHS movies from its collection. One of its VHS cassettes has been damaged such that the cassette cannot be loaded into a VHS player, but the tape can be hand-fed through the library’s duplication equipment. The library copies the movie into a digital file stored on a library computer and accessible for streaming via the library’s network. Under both the current section 108 and the Model Statutory Language, the library may allow users to watch the movie on a library terminal but may not allow users to save the file to their own media or otherwise borrow the file to view off-premises.*

#### **d. Market Check Requirement Remains, Considers Used Materials**

Both current section 108 and the Model Statutory Language require the institution to check the market for a suitable replacement before making a copy for replacement purposes.<sup>156</sup> The institution must expend a reasonable effort to search for a usable replacement at a fair price. There is a subtle, but important change here, which is that used replacements must be considered by the institution when searching. Under the current section 108, only “unused” replacements need be considered.<sup>157</sup> The Model Statutory Language replaces this language with

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<sup>154</sup> Model Statutory Language § 108(e).

<sup>155</sup> *Id.*

<sup>156</sup> 17 U.S.C. § 108(c)(1); Model Statutory Language § 108(e)(2).

<sup>157</sup> Compare 17 U.S.C. § 108(c) (“the library or archives has, after a reasonable effort, determined that an unused replacement cannot be obtained at a fair price”), with Model Statutory Language § 108(e) (“the eligible institution has, after a reasonable effort, determined that a usable replacement cannot be obtained at a fair price”).

“usable” replacements. This change follows the Study Group’s recommendation recognizing the vibrant and easily-accessible second-hand market.<sup>158</sup>

Some have raised concerns about it being difficult to do market checks on a large scale. The market check balances the need to replace works that may no longer be available with rightsholder concerns about copies usurping the market for their works. Situations in which large-scale market checks will be necessary as part of the process of making replacement copies are likely to be rare. One example, however, might be when a format becomes obsolete and the institution holds a large amount of material in that format. In those cases, institutions can conduct market checks in a systematic manner, the same way they systematically acquire and catalog works for their collections. The market checks themselves will not be onerous because of institutions’ networks of providers and easily searchable online sales platforms offering access to new and used items.

*Example: A library lends 8-track cassettes from its collection. The library has realized that 8-track players are not readily available on the market and wishes to replace the 8-tracks with compact discs, which are accessible to users. The library finds seven albums that are only available on compact discs used from second-hand sellers. The used compact discs are in very good condition. Under the current section 108, the library can make replacement copies of these albums onto compact discs. Under the Model Statutory Language, the library must purchase used copies of the compact discs if it wishes to have the albums in its collection on compact discs.*

#### **e. Obsolete Storage Format Definition Remains Unchanged**

One of the conditions for which institutions may make replacement copies of material in their collections is if the material is in an obsolete storage format.<sup>159</sup> In both the current section 108 and the Model Statutory Language, a format is considered obsolete if the device needed to perceive the work is either no longer manufactured or no longer reasonably available in the commercial marketplace.<sup>160</sup>

This either/or option allows institutions to gauge for themselves whether a storage format is obsolete. For example, upon learning that the last manufacturer of VHS players is ceasing production, an institution could begin making replacement copies of the VHS tapes in its collections.<sup>161</sup> Or, if an institution were unsure whether or not microcassette players are still being manufactured, it could scan the market to see if any are reasonably available before

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<sup>158</sup> See STUDY GROUP REPORT at 55.

<sup>159</sup> 17 U.S.C. § 108(c); Model Statutory Language § 108(e)(1).

<sup>160</sup> 17 U.S.C. § 108(c); Model Statutory Language § 108(m)(2).

<sup>161</sup> See Kris Wouk, *The Last VCR Manufacturer is Ending Production*, DIGITAL TRENDS (July 22, 2016), <http://www.digitaltrends.com/home-theater/last-vhs-manufacture-funai-to-halt-production/>.



deciding whether to make replacement copies of its collection of answering machine messages from a prominent local author.

#### **D. Copies for Users**

##### **1. Reproduction, Distribution, Public Display, and Public Performance Upon User Request—One Article or Small Part of Work**

Currently, subsection 108(d) provides that a library or archives may make one reproduction of an article or small part of a copyrighted work for a user if the copy becomes the property of the user and is used for the purposes of private study, scholarship, or research, and if the library or archives displays a warning of copyright at the place where orders are accepted and on the order form. This provision was originally “drafted with analog copying in mind, principally photocopying,” but libraries now need to use digital technologies to meet the needs of their users and to create copies of material that is born digital.<sup>162</sup> Furthermore, some methods of reproduction, such as digital copying, require the creation of incidental, temporary copies in order to make one final copy.<sup>163</sup> Accordingly, it makes sense to expand the number of copies that eligible institutions can make to a “flexible standard more appropriate to the nature of digital materials” that allows “a limited number of copies as reasonably necessary for the library or archives to provide the requesting user with a single copy of the requested work.”<sup>164</sup>

Copyright owners have expressed concerns that permitting a more flexible number of copies to be made would allow eligible institutions to make many copies of works somewhat indiscriminately and interfere with or substitute for the market for the works. As regards the interlibrary loan of articles and small parts of works, the Model Statutory Language would retain the current condition that receiving institutions not receive copies or phonorecords “in such aggregate quantities as to substitute for a subscription to or purchase of such work.”<sup>165</sup> The Office understands that most eligible institutions currently abide by the non-statutory “rule of 5” in order to avoid that result, and it does not seem likely that eligible institutions would stop making efforts to ensure they do not interfere with or substitute for the market.<sup>166</sup>

With these views in mind, the Model Statutory Language would permit libraries, archives, and museums to make as many temporary or incidental copies of an article or small part of work as necessary to result in a single copy for a requesting user.<sup>167</sup> The Model Statutory

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<sup>162</sup> STUDY GROUP REPORT at 100.

<sup>163</sup> *See id.*

<sup>164</sup> *Id.* at 101.

<sup>165</sup> Model Statutory Language § 108(g)(5).

<sup>166</sup> *See* STUDY GROUP REPORT at 99–100 (noting that “most libraries” follow the CONTU guidelines, which “state that a library or archives may not receive, in a single calendar year, more than five copies of an article or articles published in any given periodical within five years prior to the date of the request”).

<sup>167</sup> *See* Model Statutory Language § 108(g)(1), (4).

Language also allows eligible institutions to not only reproduce and distribute a copy of an article or small part of work, but also to display or publicly perform a single copy to the user.<sup>168</sup>

*Example: It would be permissible under the Model Statutory Language for Madison Museum to make a digital copy of an article about the demotion of Pluto as a planet from its collections for a user for the purposes of private study, scholarship, or research, and also make that copy available to a user through a link that the user can only access for a limited time with a user name and password.*

## **2. Reproduction, Distribution, Public Display, and Public Performance upon User Request—Entire Work**

Section 108 currently allows a library or archives to make a copy of an entire work after performing a market check (*i.e.*, “if the library or archives has first determined, on the basis of a reasonable investigation, that a copy or phonorecord of the copyrighted work cannot be obtained at a fair price”<sup>169</sup>), provided the copy becomes the property of the user and is used for the purposes of private study, scholarship, or research, and if the library or archives displays a warning of copyright at the place where orders are accepted and on its order form.<sup>170</sup> In terms of making digital copies, allowing for display and performance of the copies, and allowing digital distribution of those copies, it follows that these activities should be allowed for reproduction and distribution of entire works, as they are in the provisions for making copies upon user request of articles or small parts of works.<sup>171</sup> Scholars in any field are unlikely to be researching information solely found in articles or small parts of works, so it would unduly hinder their activities if they could only gain digital access to such information but not to entire works (provided all of the conditions below are met).

The current market check requirement for when a user requests a copy of an entire work is useful and should not be removed from section 108, but the requirement should be changed so that the “use of ‘fair price’ in subsections 108(c) and (e) and ‘reasonable price’ in subsection 108(h) [are] reconciled and a single term used to avoid confusion.”<sup>172</sup> Accordingly, the Model Statutory Language retains the market check and redefines it to encompass whether or not a user can obtain the work at a “fair price.”<sup>173</sup> The Model Statutory Language also contemplates the fact that in the current market, users may be able to both license or purchase works, and

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<sup>168</sup> See Model Statutory Language § 108(g)(1).

<sup>169</sup> 17 U.S.C. § 108(e).

<sup>170</sup> 17 U.S.C. § 108(e).

<sup>171</sup> See *supra* Section IV.D.1.

<sup>172</sup> STUDY GROUP REPORT at 105.

<sup>173</sup> Model Statutory Language § 108(g)(2).

thus includes—through the use of the term “accessed”—both licensing and purchase in the market check requirement.<sup>174</sup>

*Example: Under the Model Statutory Language, Tammy Smith, the librarian of the local community library, would not be permitted to make a digital copy of a book, How to Build Your Own Pyramid of Greatness, for a patron if she discovered that the publisher provides access to an e-book version for a nominal license fee.*

Note that the Model Statutory Language retains the current separate mechanisms for articles and small parts of works on one hand and for entire works and substantial parts of works on the other, to help ensure that copies for users, whether made directly or through interlibrary loan, do not unduly interfere with the marketplace for such works. For articles and small parts of works, it is the rule that interlibrary loan copies cannot effectively substitute for subscription or purchase by the receiving institution;<sup>175</sup> for entire works and substantial portions of works, it is the market check requirement.<sup>176</sup>

### **3. Reproduction, Distribution, Public Display, and Public Performance Upon User Request—Conditions**

Generally, section 108 should be reorganized to be read in a more logical fashion, including the provisions on copies for users, and thus all of the subsections addressing copies for users as well as the conditions that apply to making copies for users should be put together.<sup>177</sup> Accordingly, the Model Statutory Language relocates all of the provisions and conditions for reproduction, distribution, public display, and public performance pursuant to user requests in one place instead of repeating them for every type of user request.<sup>178</sup>

#### **a. Source Must Be in Collection of Library, Archives, or Museum**

Sections 108(d) and (e) currently allow a library or archives to make a copy of a work upon user request if the work is in the collection of the library or archives. The Office does not see any need to deviate from the current section 108 on this requirement, and consequently the Model Statutory Language requires that the source copy used to make a copy for a user be in the collections of the library, archives, or museum of the requesting user or of another eligible institution.<sup>179</sup>

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<sup>174</sup> See Model Statutory Language § 108(g)(2).

<sup>175</sup> Model Statutory Language § 108(g)(5).

<sup>176</sup> Model Statutory Language § 108(g)(2).

<sup>177</sup> See STUDY GROUP REPORT at 93–94.

<sup>178</sup> See Model Statutory Language § 108(g).

<sup>179</sup> See Model Statutory Language § 108(g)(3)(A).

**b. No Notice of Use for Other than Private Study, Research, or Scholarship**

Section 108 provides that libraries or archives may make copies for users as long as they have no notice that the copy will be used for any purpose other than private study, scholarship, or research.<sup>180</sup> The Copyright Office sees no need to depart from this requirement, and has kept the same requirement in the Model Statutory Language.<sup>181</sup>

**c. Provide Copyright Warning**

Section 108 provides that a library or archives must “display[] prominently, at the place where orders are accepted, and include[] on its order form, a warning of copyright in accordance with requirements that the Register of Copyrights shall prescribe by regulation.”<sup>182</sup> The Copyright Office, following the Study Group, does not see a need to deviate from this requirement,<sup>183</sup> and thus has the same provision in the Model Statutory Language, requiring that libraries, archives, and museums provide a copyright warning where orders are accepted and on order forms.<sup>184</sup> The Register of Copyrights, however, may from time to time review the regulatory warning language and propose revising it in order to comport with prevalent institutional practices, for example requiring an affirmative assent by the user that he or she has read the warning, or adjust the warning in order to take account of specific content, such as audio-visual works.

**d. Audio-Visual and Musical Works—Electronic Access by a Single User for a Limited Time**

Section 108 currently limits what kinds of works may be copied for users and excludes musical works, pictorial, graphic and sculptural works, and motion pictures and other audiovisual works.<sup>185</sup> However, the Office believes that the exceptions covering copies for users should be expanded to cover non-text-based works, as limiting

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<sup>180</sup> 17 U.S.C. § 108(d)(1), (e)(1).

<sup>181</sup> See Model Statutory Language § 108(g)(3)(B).

<sup>182</sup> 17 U.S.C. § 108(d)(2), (e)(2). The text of the current warning is provided in 37 CFR § 201.14(b): “The copyright law of the United States (title 17, United States Code) governs the making of photocopies or other reproductions of copyrighted material. Under certain conditions specified in the law, libraries and archives are authorized to furnish a photocopy or other reproduction. One of these specific conditions is that the photocopy or reproduction is not to be ‘used for any purpose other than private study, scholarship, or research.’ If a user makes a request for, or later uses, a photocopy or reproduction for purposes in excess of ‘fair use,’ that user may be liable for copyright infringement. This institution reserves the right to refuse to accept a copying order if, in its judgment, fulfillment of the order would involve violation of copyright law.”

<sup>183</sup> See STUDY GROUP REPORT at 98–101.

<sup>184</sup> See Model Statutory Language § 108(g)(3)(C).

<sup>185</sup> See 17 U.S.C. § 108(i). Relevant exceptions to the section 108(i) exclusions are: (1) audiovisual works dealing with news; and (2) reproduction and distribution of pictorial or graphic works published as illustrations, diagrams, or similar adjuncts to works reproduced or distributed pursuant to the copies for users provisions. 17 U.S.C. § 108(i).

the applicability of these exceptions “appears to create a disproportionate impact on some academic disciplines, such as music and art scholarship, although both textual and non-text-based works now may be experienced with the same technology, in the same manner, and often together in multimedia works, including most websites.”<sup>186</sup> Because expanding these subsections may create new risks to copyright owners, the Study Group suggested that it may be helpful to also amend the provisions on copies for users “to include appropriate additional conditions to prevent a material impact on the commercial exploitation of the affected works.”<sup>187</sup>

Accordingly, the Model Statutory Language removes the provision entirely as it seems arbitrarily restrictive to prohibit libraries, archives, and museums from making reproductions of the types of works common and necessary to music, film, art and interdisciplinary studies. The Model Statutory Language also imposes conditions on distribution, public display, and public performance of audio-visual and musical works, because it appears to the Office that those two categories of works are the most likely to have developed operating entertainment markets that may be harmed by unfettered copying for users. Specifically, the Model Statutory Language provides that electronic distribution, public display, or public performance of digital copies of audio-visual and musical works be made “to only one user at a time, for a limited time.”<sup>188</sup> The Office believes, however, that pictorial, graphic, and sculptural works—which already enjoy an exclusion in the current statute—should be treated the same as books and other printed works. For all works, of course, a market check where copies of entire works are made for users will still be in effect.<sup>189</sup>

*Example: If a patron of the Farmington Public Library requests a digital copy of a photograph by a local photographer that the library has in its collection, the library may reproduce and distribute to that patron a digital copy, unless the library has made a reasonable determination that digital copies of the photograph are available to the public via licenses from the photographer or another authorized service.*

*Example: If a motion picture archives is streaming a comedy routine from a 1967 episode of “Hollywood Chateau” to one user, and a second user requests the same work, the archives must wait until the first user’s limited time (e.g., two weeks) has expired before it streams a copy to the second user.*

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<sup>186</sup> STUDY GROUP REPORT at 107. *But see* H.R. REP. NO. 94-1476, at 78 (1976) (stating that fair use remains “fully applicable” to musical, graphic, and audiovisual works exempted from the coverage of the copies-for-users exceptions).

<sup>187</sup> STUDY GROUP REPORT at 107.

<sup>188</sup> Model Statutory Language § 108(g)(3)(D). The Study Group recommended that this condition be applied to all digital distributions of copies for users, STUDY GROUP REPORT at 98, but the Office believes that such an approach would be overly constraining on libraries, archives, and museums.

<sup>189</sup> *See* Model Statutory Language § 108(g)(2).

**e. No Related or Concerted Reproduction of Same Material**

Current section 108(g) extends the exceptions to the rights of reproduction and distribution “to the isolated and unrelated reproduction or distribution of a single copy or phonorecord of the same material on separate occasions.”<sup>190</sup> However, these exceptions do not extend to cases where the library or archives “is aware or has substantial reason to believe it is engaging in the related or concerted reproduction or distribution of multiple copies or phonorecords of the same material, whether made on one occasion or over a period of time, and whether intended for aggregate use by one or more individuals or for separate use by the individual members of a group.”<sup>191</sup> Neither do they extend to where the library or archives “engages in the systematic reproduction or distribution of single or multiple copies or phonorecords of material described in subsection (d) [articles and small parts of copyrighted works],” except as needed for interlibrary loan, as long as the library or archives “receiving such copies or phonorecords for distribution does so in such aggregate quantities as to substitute for a subscription to or purchase of such work.”<sup>192</sup> Congress intended this last provision “to prevent libraries and archives from dividing the purchase of periodicals and sharing them through ILL arrangements” because doing so “would tip the balance too far in favor of libraries and archives and materially affect sales.”<sup>193</sup>

The Copyright Office recognizes the importance of these provisions and Congress’s intent, and has combined the separate provisions of current section 108(g) into a single provision that prohibits libraries, archives, and museums from knowingly or with substantial reason to believe, making related or concerted reproduction or distribution of the same material when making copies for users.<sup>194</sup>

*Example: A university library is asked by a professor to make a copy of a particular sound recording for any student in the professor’s class who requests it. Even assuming that a market check has demonstrated that access to this recording cannot be had at a reasonable cost, the library may not make the copies requested by the professor. However, if multiple individual students, who to the library’s knowledge are not part of a group, request copies of this sound recording, the library may provide the copies.*

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<sup>190</sup> 17 U.S.C. § 108(g).

<sup>191</sup> 17 U.S.C. § 108(g)(1).

<sup>192</sup> 17 U.S.C. § 108(g)(2).

<sup>193</sup> See STUDY GROUP REPORT at 99.

<sup>194</sup> See Model Statutory Language § 108(g)(3)(E).

The Office has also added a separate section addressing interlibrary loan, containing similar language as the current subsection 108(g)(2) regarding reproduction and distribution of articles or small parts of works.<sup>195</sup>

#### **4. Number of Copies as Reasonably Necessary to Result in Single End-Use Copy**

As discussed above, section 108 was drafted with analog copying in mind, but libraries and archives currently require increased flexibility in order to make digital copies of works since digitally copying works requires the creation of a number of temporary, incidental copies to create that single end-use copy, and since many works are now born digital.

The Copyright Office believes that libraries, archives, and museums should be allowed to continue making and providing digital copies, and consequently, in the Model Statutory Language, libraries, archives, and museums are allowed to make as many copies as is reasonably necessary to create one end-use copy for the user.<sup>196</sup>

*Example: Madison Museum would be permitted to make one digital copy, which necessarily creates a number of temporary, incidental copies, of an article about the distinction between Afrobeat and Afrobeats music from its collections, as long as doing so results in a single copy transmitted to each requesting user.*

#### **5. Interlibrary Loan Conditions**

The Model Statutory Language contains two copies-for-users provisions specifically concerning interlibrary loan (“ILL”) practices. The first, described above, retains the current requirement that a library or archives receiving articles or small parts of works through interlibrary loan not do so in a way that would substitute for a subscription to or purchase of the work.<sup>197</sup> The second is a re-casting of the current requirement that a copy made for a user must become “the property of the user.”<sup>198</sup> This provision was inserted to ensure that interlibrary loan copies could not be used by libraries and archives to augment their own collections.<sup>199</sup> The Office agrees that libraries, archives, and museums should continue to be unable to enlarge their collections using interlibrary loan copies, and in order to take into account the making of digital copies, and the likelihood that the user will not be accessing a physical copy, the Office agrees with the Study Group that the “current requirement that ‘the copy or phonorecord become the property of the user’ should be revised to provide instead that

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<sup>195</sup> See Model Statutory Language § 108(g)(5).

<sup>196</sup> See Model Statutory Language § 108(g)(4).

<sup>197</sup> See 17 U.S.C. § 108(g)(2); Model Statutory Language § 108(g)(5); see also discussion of provision *supra* Section D.1.

<sup>198</sup> 17 U.S.C. § 108(d)(1), (e)(1).

<sup>199</sup> See STUDY GROUP REPORT at 104–105.

the library or archives may not retain any copy made under these provisions in order to augment its collections or to facilitate further ILL.”<sup>200</sup>

Accordingly, the Model Statutory Language provides that a copy made at the request of a user “may not be added to the receiving institution’s collections.”<sup>201</sup>

*Example: If the Adams Library has sent a digital copy of a popular book to the Madison Museum to fulfill a museum patron’s request, the museum may not print out and add the copy to its collections. Instead, the copy should be deleted once the user has gained access.*

## **E. The Internet**

The Study Group Report recommended adding a new exception to section 108 to permit eligible institutions to capture, reproduce, and distribute publicly available online content to users for the purposes of private study, scholarship, or research.<sup>202</sup> Many libraries and archives are currently practicing web archiving and rely on fair use or individual permission agreements with rightsholders to preserve internet content.<sup>203</sup> After considering the broad range of issues that such statutory exception for web archiving would entail, the Copyright Office is not proposing an exception for the preservation and distribution of internet content at this time. More detailed study on such related issues as accommodating the evolution of technology, whether and how to institute a notice-and-takedown process, determining whether a particular work is “publicly available,”<sup>204</sup> and treating commercial works appropriately, is necessary before any specific legislative proposals are made.

## **F. Fair Use Savings Clause**

Section 108 has a fair use savings clause providing that nothing in section 108 “in any way affects the right of fair use as provided by section 107.”<sup>205</sup> At the time of enactment, Congress specifically noted that “[n]o provision of section 108 is intended to take away any

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<sup>200</sup> *Id.* at 104.

<sup>201</sup> Model Statutory Language § 108(g)(5).

<sup>202</sup> STUDY GROUP REPORT at 80.

<sup>203</sup> See, e.g., ASS’N OF RESEARCH LIBRARIES, CODE OF BEST PRACTICES IN FAIR USE FOR ACADEMIC AND RESEARCH LIBRARIES 9 (2012), <http://www.arl.org/storage/documents/publications/code-of-best-practices-fair-use.pdf>; *Web Archiving at the Library of Congress*, LIBRARY OF CONGRESS, <https://www.loc.gov/webarchiving/about.html> (discussing the selection and permissions process developed by the Library of Congress’ Web Archiving Team).

<sup>204</sup> Determining whether a work is “publicly available” in the online context is much more complex than the question of whether a work is “publicly disseminated” or “not publicly disseminated,” as discussed early in this document. See *supra* Section IV.C.1.a. The online environment has many different shades of availability, from universally available to available only to select persons, and the nature of a work’s availability may change over its life-cycle.

<sup>205</sup> 17 U.S.C. § 108(f)(4).



rights existing under the fair use doctrine.”<sup>206</sup> Additionally, as the Study Group noted, “[c]ertain preservation activities fall within the scope of fair use, regardless of whether they would be permitted by section 108.”<sup>207</sup> The fact that a library or archives covered by section 108 is also free to rely upon fair use was further bolstered by the Second Circuit Court of Appeals in *Authors Guild v. HathiTrust*, which found, “we do not construe § 108 as foreclosing our analysis of the Libraries’ activities under fair use . . . .”<sup>208</sup> In recognition of Congress’s intent to maintain both section 108 and fair use as tools for libraries and archives, and the use and acceptance of this principle by eligible institutions, copyright owners, users, and the courts, the Copyright Office feels strongly that the fair use savings clause *must* remain in section 108 regardless of any other amendments that may be found necessary.<sup>209</sup> Even a revised section 108 cannot address every situation in which public policy would deem it reasonable for a library or archives to reproduce or distribute a copy of a work without first attempting to seek permission. In fact, this Discussion Document explicitly leaves web harvesting and similar collection of internet content by libraries and archives to fair use, and there are other circumstances not addressed by section 108, such as electronic reserves, where fair use must continue to govern. Thus, it is essential that the fair use savings clause stay in section 108.<sup>210</sup>

## **G. Other Provisions**

### **1. Audio-Visual News Programs**

Current subsection 108(f)(3) allows libraries and archives to lend a limited number of copies and excerpts of audio-visual (“A/V”) news programs as long as the reproduction or distribution comports with the general conditions required of all section 108 activities.<sup>211</sup> This provision allows libraries and archives to “capture off air and preserve television news” in order to “ensure independent third-party resources for news broadcasts and the ability of the public to access these resources.”<sup>212</sup> However, in light of changing technology and standard practices, it seems advisable to expand the exception beyond physical lending, while still restricting libraries, archives, and museums from sending downloadable copies of works.<sup>213</sup> The Office believes an acceptable way of amending the exception is to permit eligible institutions to also transmit a copy of an A/V news program to other eligible institutions through streaming technology, such that a new permanent copy is not created.

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<sup>206</sup> H.R. REP. NO. 94-1476, at 74 (1976).

<sup>207</sup> STUDY GROUP REPORT at 22.

<sup>208</sup> *Authors Guild, Inc. v. HathiTrust*, 755 F.3d 87, 94 n. 4 (2d Cir. 2014).

<sup>209</sup> See Model Statutory Language § 108(k)(1).

<sup>210</sup> For further discussion of the relationship of fair use to section 108, see *supra* Section III.B.

<sup>211</sup> 17 U.S.C. § 108(f)(3).

<sup>212</sup> STUDY GROUP REPORT at 88–89.

<sup>213</sup> See *id.* at 89.

Consequently, the Model Statutory Language not only allows the reproduction and distribution of A/V news programs, but also the public display and public performance of them, though the Model Statutory Language restricts the electronic transmission of digital copies to another eligible institution in a manner that does not create a new permanent copy.<sup>214</sup>

*Example: When Library A records a segment from a nightly news program dealing with an issue of local concern, it may both distribute a limited number of physical copies (for example, on DVD) to members of the public and stream a copy of the segment to another library, archives, or museum.*

## **2. Exception for Uses in the Last Twenty Years of Copyright Term**

The current section 108 contains an exception for published works in the last twenty years of their term of protection. Added as part of the Copyright Term Extension Act (CTEA),<sup>215</sup> subsection 108(h) states that once a published work is in its last twenty years of copyright protection, a library or archives may reproduce, distribute, display, or perform that work, for purposes of preservation, scholarship, or research, provided the institution has determined after reasonable investigation that the work is not currently subject to normal commercial exploitation,<sup>216</sup> that a new or used copy of the work is not available at a reasonable price,<sup>217</sup> or that the copyright owner has not filed a notice with the Copyright Office that either of the first conditions applies.<sup>218</sup>

This concept regarding works in the last twenty years of term remains in the Model Statutory Language. However, the Model Statutory Language would expand the exception from covering only published works to covering all works, to correspond with the term extension for *all* works under the CTEA.<sup>219</sup> The general conditions—not subject to normal commercial exploitation or cannot be obtained at a fair price—would remain in the Model Statutory Language.<sup>220</sup> The Model Statutory Language, however, would not offer the option for a copyright owner of a published work to file a notice with the Copyright Office that either the work is subject to normal commercial exploitation or the work can be obtained at a fair price. As of the date of this report, no rightsholder has ever filed such a notice with the Copyright Office and, thus, such option would appear extraneous to the two current “market check” options.

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<sup>214</sup> Model Statutory Language § 108(h).

<sup>215</sup> Sonny Bono Copyright Term Extension Act, Pub. L. No. 105–298, § 104, 112 Stat. 2827, 2829 (1998).

<sup>216</sup> 17 U.S.C. § 108(h)(2)(A).

<sup>217</sup> 17 U.S.C. § 108(h)(2)(B).

<sup>218</sup> 17 U.S.C. § 108(h)(2)(C).

<sup>219</sup> Model Statutory Language § 108(i).

<sup>220</sup> Model Statutory Language § 108(i)(1)(A)–(B).

*Example: Because 51 years have expired since the death of its author, a musical work has entered its last 20 years of protection. An archives would like to mount a scholarly retrospective program on the author, so it performs a reasonable investigation and discovers that the work is neither being commercially exploited, nor are copies or phonorecords available at a reasonable price. The archives may thus publicly perform a copy of the musical work as part of its retrospective.*

Because this exception would be expanded to include works not disseminated to the public, the Model Statutory Language would provide a means, appropriate to the nature of such works, for their owners to object to their use during the last twenty years of protection. Such an objection would be made through a notice system similar to the one currently in place for published works, except that commercial exploitation or market obtainability would not be factors.<sup>221</sup>

### **3. Unsupervised Reproduction Equipment**

The current subsection 108(f)(1) states that section 108 imposes no liability on a library or archives for copyright infringement accomplished through the “unsupervised use of reproducing equipment located on its premises,” as long as such equipment displays a copyright notice.<sup>222</sup> The Study Group noted that this subsection does not address a library’s or archives’ potential liability regarding the use of portable, user-owned copying equipment and thus recommended in the Report that subsection 108(f)(1) be expanded to include such personal reproducing equipment.<sup>223</sup>

The Model Statutory Language follows the Study Group recommendation and would expand the unsupervised reproducing equipment provision to include personal copying equipment.<sup>224</sup> In order to avoid liability for any copyright infringement resulting from the use of such equipment, the eligible institution would need to post copyright notices in those areas open to the public.<sup>225</sup> Like the current section 108 provision, the Model Statutory Language would not require specific language in the copyright notice as long as it conveys that “the making of a copy or phonorecord may constitute copyright infringement.”<sup>226</sup>

*Example: Walpole University Library permits patrons to have smart phones while viewing material in the reading room. Throughout the reading room, the library has posted notices that the making of a copy of a work in the library’s collection may*

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<sup>221</sup> See Model Statutory Language § 108(i)(1)(C).

<sup>222</sup> 17 U.S.C. § 108(f)(1).

<sup>223</sup> STUDY GROUP REPORT at 91.

<sup>224</sup> Model Statutory Language § 108(j)(1).

<sup>225</sup> *Id.*

<sup>226</sup> *Id.*

*constitute copyright infringement. Thus, Walpole University Library is not liable for copyright infringement by an unsupervised patron on the library's premises.*

Expanding this provision reflects the proliferation of personal reproducing equipment owned and operated by users of libraries, archives, and museums. Because these institutions do not have the resources to oversee and enforce a complete ban on personal reproducing equipment, expanding the protection against secondary liability to cover this type of equipment relieves the institutions from such an unrealistic burden. Similarly, because users can use these devices anywhere in the library, archives, or museum, the institutions must post clearly visible copyright notices in their public areas.

#### **4. Contracts**

The current section 108 expressly provides that nothing in the section “in any way affects . . . any contractual obligations assumed at any time by the library or archives when it obtained a copy or phonorecord of a work in its collections.”<sup>227</sup> The Model Statutory Language proposes two changes to this provision. The first is to clarify that the primacy of contract language applies to license agreements as well as purchase agreements. While the section 108 contract clause was enacted in order to address circumstances where a library or archives obtains works as part of a purchase of a literary estate or similar agreement,<sup>228</sup> in practice it is now understood to encompass all contractual obligations, including access licenses.<sup>229</sup> The Model Statutory Language makes this understanding explicit.

The second proposed change to the contract clause is a new proviso stating that libraries, archives, and museums will not be liable for copyright infringement if they make preservation or security copies of works covered by non-negotiable contractual language prohibiting such activities. Eligible entities may still be liable for damages under state contract law, depending upon the circumstances, but federal copyright liability will not apply.<sup>230</sup>

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<sup>227</sup> 17 U.S.C. § 108(f)(4).

<sup>228</sup> See H.R. REP. NO. 94-1476 at 77 (1976) (“This clause is intended to encompass the situation where an individual makes papers, manuscripts or other works available to a library with the understanding that they will not be reproduced.”).

<sup>229</sup> See STUDY GROUP REPORT at 120 (“Although enacted prior to the development of markets for licensing electronic media, the provision covers any enforceable contract that a library or archives enters into for the acquisition of materials or for access to materials, and includes non-negotiable licenses, such as shrink-wrap and click-wrap agreements.”).

<sup>230</sup> This proviso only applies to copyright infringement liability, and not to liability under the section 1201 anti-circumvention provisions.

To be sure, the broader question of whether violation of a contract term can properly give rise to a claim of copyright infringement is still being debated.<sup>231</sup> However, to the extent that a licensor attempts to pursue infringement liability because of a library's violation of a term prohibiting preservation reproduction in a non-bargained-for agreement, the proposed proviso would bar such liability.

The Copyright Office believes that the section 108 contract supremacy clause is important to retain in order to preserve the viability of contracts and other agreements in the library, archives, and museum contexts. This position is consistent with the Office's previously stated view on the sanctity of the freedom to contract. However, the Model Statutory Language's proposed change would limit the remedies that could be sought for a narrow slice of non-negotiable contract provisions, specifically terms prohibiting preservation or security reproduction that are pre-set by one party and cannot be altered through bargaining or negotiation. This proposal recognizes that preservation and security are crucial public goods that the Copyright Act should not allow to be unduly restricted absent negotiation.

Librarians, archivists, and others with an interest in preservation have stressed their concern that contracts could effectively annul the exceptions in section 108 for certain types of content. A large amount of content is now accessed on library premises through contracts and licenses rather than purchased by the library for their collections.<sup>232</sup> Access to this content by both institutions and their users is controlled by contractual terms.

As the Study Group pointed out, "[f]reedom to contract is a fundamental principle in American law," and statutory law rarely interferes with private contracts.<sup>233</sup> Rightsholders have expressed their own concerns that allowing section 108 to override contractual provisions in any way will undermine the sanctity of those contracts.

Some believe that preservation of content obtained by license is a non-issue, as the rightsholders themselves maintain archives. This is true for some large rightsholders, but there also are many rightsholders, large and small, who do not or cannot maintain archives. Additionally, archives maintained by institutions focused on preservation, such as libraries, archives, and museums, may be curated and used for different purposes than those held for private purposes. Specifically, collections of cultural institutions tend to be preserved for purposes of private study, scholarship, and research, instead of with an eye towards

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<sup>231</sup> For a discussion of this issue, see U.S. COPYRIGHT OFFICE, SOFTWARE-ENABLED CONSUMER PRODUCTS: A REPORT OF THE REGISTER OF COPYRIGHTS 65–67 (2016), available at <https://www.copyright.gov/policy/software/software-full-report.pdf>.

<sup>232</sup> See *Preservation and Reuse of Copyrighted Works: Hearing Before the Subcomm. on Courts, Intellectual Prop., & the Internet of the H. Comm. on the Judiciary*, 113th Cong. 52 (2014) (statement of James G. Neal, Vice President for Information Services and University Librarian, Columbia University) ("... many research libraries spend over 65% of their acquisition budgets on electronic resources.").

<sup>233</sup> STUDY GROUP REPORT at 121.

maximizing their market value and minimizing costs.<sup>234</sup> Hence, the importance of ensuring that such institutions have the maximum reasonable legal ability to preserve works that they hold and to which they provide access.

The Model Statutory Language approach proposes a compromise in providing for the needs of independent preservationists while recognizing the importance of the sanctity of contracts. It maintains the long-standing rule that section 108 does not generally affect contractual obligations, but adds the proviso that making copies solely for preservation and security cannot make an institution liable for infringement, despite contrary non-negotiable contract terms.<sup>235</sup> This would specifically apply to “click-wrap” licenses and other similar contracts, which do not provide licensees with the ability to negotiate.

*Examples: A library licenses electronic resources from a publisher who offers a “take-it-or-leave-it,” non-negotiable license that includes prohibitions on copying for any reason, including preservation or security. The library, if it chooses to reproduce copies of the electronic resources for preservation, will not be liable for copyright infringement, but may still be liable for breach of contract.*

*A purchase agreement for a collection of unpublished typewritten manuscripts contains both negotiable and non-negotiable terms, with those terms addressing preservation and security copying being negotiable. Thus, even though part of the agreement is non-negotiable, the fact that the relevant provisions are negotiable means that their violation may give rise to copyright infringement liability.*

*A contract for the licensed use of certain electronic resources is presented to a library as non-negotiable. However, the purchase order that implements the license does provide the library the opportunity to negotiate its preservation copying provisions. The contract terms would therefore be considered as negotiable, and their violation may constitute copyright infringement.*

The Office restates its view that the sanctity of the freedom to contract remains an integral part of a well-functioning copyright system. Thus, the Office’s limited proviso here is not meant to suggest the need or support for limiting remedies for breach of contract in any other areas. To the contrary, the Office stresses that this section 108 contract clause proviso is restricted in application to contract provisions that prevent reproduction for preservation or security. It neither affects provisions that address copying for any other purpose, such as for replacement or at user request, nor provisions that address distribution, performance, or

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<sup>234</sup> For a discussion of preservation by rightsholders compared with preservation by libraries, archives, and museums see *id.* at 72–73.

<sup>235</sup> Model Statutory Language § 108(k)(2). A different kind of compromise, wherein non-negotiable contracts barring preservation or security copying would be deemed void, was discussed in the Study Group Report, but there was no unanimous agreement on a resolution. See STUDY GROUP REPORT at 121–22.

display, for any purpose at all. Moreover, for the reasons stated above, the Office would strongly oppose suggestions that this proviso should be expanded to cover additional aspects of section 108.

## 5. Outsourcing

Under section 108, libraries and archives have the legal mechanisms to reproduce works for certain purposes. This does not, however, mean they have the technical capabilities to make those reproductions. This is especially true when reproducing a work requires format shifting or using complicated or expensive technology. While it is standard practice to hire third parties to make reproductions for activities conducted under section 108,<sup>236</sup> this activity is not protected by the current statute. Under the current section 108, library and archive employees are explicitly protected from liability but the third-party contractors retained by the library or archive are not specifically mentioned.<sup>237</sup>

The Model Statutory Language seeks to address this potential gap by allowing institutions to utilize third-party providers for reproduction activities *only*.<sup>238</sup> The ability of institutions to utilize outside contractors for reproduction activities permitted under section 108 was unanimously supported by the Section 108 Study Group.<sup>239</sup>

There are two requirements the third party must meet in order to qualify as a provider under the Model Statutory Language. The third party must “act[] solely as the compensated provider . . . and not for any other direct or indirect commercial benefit,”<sup>240</sup> and the third party must be “contractually prohibited from retaining copies.”<sup>241</sup> Additionally, third-party contractors may not be immunized from copyright infringement for any activities done outside the scope of section 108.<sup>242</sup>

Allowing third parties to assist libraries, archives, and museums with their reproduction efforts facilitates legal archiving and preservation. Institutions can take advantage of section 108 exceptions without needing to invest heavily in technology, equipment, or staff dedicated solely to making reproductions.

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<sup>236</sup> See STUDY GROUP REPORT at 40 (“many libraries and archives must, as a practical matter, use contractor assistance to make section 108-permitted copies in a number of different circumstances”).

<sup>237</sup> See *id.* at 39.

<sup>238</sup> Model Statutory Language § 108(l).

<sup>239</sup> STUDY GROUP REPORT at 39–40.

<sup>240</sup> Model Statutory Language § 108(l)(1).

<sup>241</sup> Model Statutory Language § 108(l)(2).

<sup>242</sup> Model Statutory Language § 108(l)(3).

Third-party providers of reproduction services are not exempt from copyright law. They are still liable for infringing activities, including reproduction, when those activities are done outside of section 108's narrowly tailored exceptions. Requirements for the third party to be a compensated provider that does not receive any other direct or indirect commercial benefits help ensure that those providing this service to institutions are legitimate professionals who have assets and professional reputations at risk if they violate copyright law. This addresses concerns about accountability acknowledged by the Study Group.<sup>243</sup>

The requirement that the third-party contractors may not keep copies also helps address concerns about facilitating infringement. Reproductions undertaken by third parties on behalf of libraries, archives, and museums must only be for those institutions' archiving and preservation efforts. The copies made by the third parties are solely for the institutions' in-house use. As such, there is no reason for the third parties to retain copies of any of the works they reproduce for institutions. The prohibition against maintaining copies helps guard against institutions inadvertently fueling a replacement market of copies.<sup>244</sup>

*Example: A library has a number of educational film strips it needs to digitize for preservation purposes. It contracts with a reproduction company to do the digitizing, and the contract specifies that the company may not retain any copies of the works for longer than it takes to do the job. Under current section 108, the library may hire the reproduction company to digitize the film strips, but the company is not immunized against claims of copyright infringement by section 108. Under the Model Statutory Language, the company is immunized against claims of copyright infringement for its contracted activities, but it remains liable for copyright infringement for activities outside the contract, such as distributing copies of the filmstrips to another library.*

## V. CONCLUSION

Libraries, archives, and museums provide invaluable services to their users and to society at large. The Copyright Office believes that these institutions, along with their patrons and other members of the creative ecosystem, deserve updated, easy to understand, and balanced copyright exceptions. With this Discussion Document, the Office hopes that the Model Statutory Language provides a useful basis for further discussion among Congress and stakeholders within the context of the current comprehensive copyright law review process.

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<sup>243</sup> See STUDY GROUP REPORT at 40–41.

<sup>244</sup> For example, the Study Group discussed concerns that contractors or their employees might distribute unauthorized digital copies of works. See *id.* at 40.



**APPENDIX A      MODEL STATUTORY LANGUAGE**

**APPENDIX A: MODEL STATUTORY LANGUAGE**

The Model Statutory Language is, as discussed in the Introduction, intended as a discussion-starter and not as the Copyright Office’s final word on the subject of section 108 revision. In addition to revising current provisions and introducing new provisions, the Model Statutory Language reorganizes section 108 so that it is more comprehensible and easier to follow.

**§ 108 – Limitation on exclusive rights: use by libraries, archives, and museums**

- (a) **CONDITIONS FOR ELIGIBILITY.**—Except as otherwise provided in this title and notwithstanding the provisions of section 106, it is not an infringement of copyright for a library, archives, museum, or any of its employees acting in the scope of their employment to reproduce, distribute, publicly display, or publicly perform a work under the conditions specified by this section, provided –
- (1) the collections of the library, archives, or museum are (i) open to the public, or (ii) available not only to researchers affiliated with the library, archives, or museum or with the institution of which it is a part, but also to other persons doing research in a specialized field;
  - (2) the library, archives, or museum has a public service mission;
  - (3) the library, archives, or museum’s trained staff or volunteers provide professional services normally associated with libraries, archives, or museums;
  - (4) the collections of the library, archives, or museum are composed of lawfully acquired and/or licensed materials; and
  - (5) the library, archives, or museum implements reasonable digital security measures as appropriate for the activities permitted in this section.
- (b) **GENERAL REQUIREMENTS.**—Under this section, any reproduction, distribution, public display, or public performance of a work must –
- (1) be made without any purpose of direct or indirect commercial advantage; and
  - (2) include the notice of copyright that appears on the copy or phonorecord that is reproduced under the provisions of this section, or, if no such notice can be found, include a legend stating that the work may be protected by copyright.
- (c) **PRESERVATION AND SECURITY.**—An institution eligible under subsection (a) may reproduce each copy or phonorecord of a work currently in the collection of that institution as many times as is reasonably necessary for preservation and security. In addition –

- (1) A reproduction made under this subsection, if made from a work not disseminated to the public, may be made available to the public only –
    - (A) on the premises of the eligible institution;
    - (B) by lending a physical copy or phonorecord to a user; or
    - (C) by providing access to a digital, non-physical copy or phonorecord to a single user at a time, for a limited time.
  - (2) such copies and phonorecords, if made from works lawfully disseminated to the public, may be made available only on the premises to employees of the eligible institution, but not to members of the public.
- (d) DEPOSIT FOR RESEARCH USE IN ANOTHER ELIGIBLE INSTITUTION. —
- (1) An institution eligible under subsection (a) may reproduce one copy or phonorecord of a work currently in the collection of that institution for deposit for research use in other eligible institutions: *Provided*, for works disseminated to the public, a receiving institution has, after a reasonable effort, determined that a usable copy or phonorecord cannot be obtained at a fair price.
  - (2) USE BY RECEIVING INSTITUTIONS:
    - (A) Such a copy or phonorecord, if made from a work not disseminated to the public, may be made available to the public only –
      - (i) on the premises of the eligible institution;
      - (ii) by lending a physical copy or phonorecord to a user; and
      - (iii) by providing access to a digital, non-physical copy or phonorecord to a single user at a time, for a limited time.
    - (B) Such copy or phonorecord, if made from a work lawfully disseminated to the public, may be made available to a user only on the premises of the institution.
    - (C) Such copies and phonorecords may not become part of the collections of the receiving institutions for the purposes of this section, but may be used as sources for replacement reproduction under subsection (e).
- (e) REPLACEMENT. — An institution eligible under subsection (a) may reproduce one copy or phonorecord of a work lawfully disseminated to the public, and currently in the collection of that institution: *Provided* –
- (1) the copy or phonorecord being replaced is damaged, deteriorating, lost, stolen, fragile, or in an obsolete storage format; and
  - (2) the eligible institution has, after a reasonable effort, determined that a usable replacement cannot be obtained at a fair price.

A replacement copy or phonorecord made under this subsection in any physical format may be lent for use outside the premises of the eligible institution in lawful possession of such copy or phonorecord, provided the replacement copy is lent in the same manner as the original; but digital copies and phonorecords in non-physical formats may not be made available to the public outside the premises of the eligible institution.

- (f) NUMBER OF TEMPORARY, INCIDENTAL COPIES OR PHONORECORDS. — The exceptions in subsections (d) and (e) allow the creation of a limited number of temporary, incidental copies or phonorecords as reasonably necessary to result in one end-use copy.
- (g) REPRODUCTION, DISTRIBUTION, PUBLIC DISPLAY, AND PUBLIC PERFORMANCE PURSUANT TO USER REQUESTS. —
- (1) ONE ARTICLE OR SMALL PART OF WORK. If a user requests a copy of one article or other contribution to a copyrighted collection or periodical issue, or a small part of any other copyrighted work, an institution eligible under subsection (a) may reproduce, distribute, publicly display, or publicly perform a single copy to the user.
  - (2) ENTIRE WORK OR SUBSTANTIAL PART OF WORK. If a user requests a copy or phonorecord of an entire work or a substantial part of a work, an institution eligible under subsection (a) may reproduce, distribute, publicly display, or publicly perform a single copy or phonorecord to the user, after having first made a reasonable determination that a usable copy or phonorecord of the work cannot be accessed by the user through purchase or license at a fair price.
  - (3) CONDITIONS.
    - (A) The source copy or phonorecord must come from the collections of either the eligible institution where the user makes his or her request, or from the collections of another eligible institution;
    - (B) the eligible institution must have no notice that the copy or phonorecord will be used for any purpose other than private study, scholarship, or research;
    - (C) the eligible institution must display prominently, at the place where orders are accepted, and include on its order form, a notice of copyright in accordance with requirements that the Register of Copyrights shall prescribe by regulation;
    - (D) electronic distribution, display, or performance of digital copies or phonorecords of audio-visual works and musical works may be made to only one user at a time, for a limited time; and

- (E) the eligible institution, or its employee, must have no knowledge or substantial reason to believe that it is engaging in the related or concerted reproduction or distribution of multiple copies or phonorecords of the same material, whether made on one occasion or over a period of time, and whether intended for aggregate use by one or more individuals or for separate use by the individual members of a group.
  - (4) USER REQUESTS: NUMBER OF TEMPORARY, INCIDENTAL COPIES OR PHONORECORDS. The exceptions in this subsection allow a limited number of temporary, incidental copies or phonorecords as reasonably necessary to result in the distribution, public display, or public performance of a single copy to the user.
  - (5) USER REQUESTS: INTERLIBRARY LOAN. If copies or phonorecords made under subsections (g)(1) and (g)(3) are distributed to fulfill interlibrary loan requests, the receiving institution may not receive copies or phonorecords in such aggregate quantities as to substitute for a subscription or purchase of the work. Any copies or phonorecords so received may not be added to the receiving institution's collections.
  - (6) USER REQUESTS: SUBSEQUENT LIABILITY. Nothing in this section excuses a user requesting or receiving a copy or phonorecord of a work from liability for copyright infringement.
- (h) AUDIO-VISUAL NEWS PROGRAMS.—Eligible institutions may reproduce, distribute, publicly display, or publicly perform a limited number of copies and excerpts of audio-visual news programs, either through lending a physical copy to a user, or by digitally transmitting a copy to another eligible institution in a manner that does not create a new permanent copy.
- (i) EXCEPTION FOR THE LAST 20 YEARS OF COPYRIGHT PROTECTION.—
- (1) For purposes of this section, during the last 20 years of any term of copyright of any work, an eligible institution may reproduce, distribute, publicly display, or publicly perform a copy or phonorecord of such work, or portions thereof, for purposes of preservation, scholarship, or research, unless such institution has first determined, on the basis of a reasonable investigation, that—
    - (A) the work is subject to normal commercial exploitation;
    - (B) a copy or phonorecord of the work can be obtained at a fair price; or
    - (C) for works not distributed to the public the copyright owner or its agent provides notice pursuant to regulations promulgated by the Register of Copyrights that it objects to the use described in this subparagraph.

- (2) The exemption provided in this subsection does not apply to any subsequent uses by users other than such eligible institution.

(j) UNSUPERVISED USE OF REPRODUCING EQUIPMENT. —

- (1) Eligible institutions and their employees shall not be liable for copyright infringement for the unsupervised use of reproducing equipment located on their premises, including equipment brought onto the premises by users: *Provided*, that the public areas of the eligible institution display notices that the making of a copy or phonorecord may constitute copyright infringement.
- (2) Nothing in this section excuses a user of unsupervised reproducing equipment on the premises of an eligible institution from liability for copyright infringement.

(k) RELATION TO OTHER PROVISIONS OF TITLE 17, AND TO CONTRACTUAL OBLIGATIONS. —

- (1) This section does not in any way affect the right of fair use as provided by section 107.
- (2) This section does not in any way affect any contractual obligations assumed at any time by the eligible institution when it obtained, or licensed the use of, a copy or phonorecord of a work in its collection: *Provided*, that the eligible institution is not liable for infringement under this title for violating any non-negotiable contractual provision that prohibits the making of preservation or security copies, as those activities are permitted under subsection (c).

(l) REPRODUCTION BY THIRD PARTIES. — A library, archives, or museum may authorize a third party to perform the reproduction activities permitted under this section, provided—

- (1) the third party acts solely as the compensated provider of a service for the library, archives, or museum, and not for any other direct or indirect commercial benefit;
- (2) the third party is contractually prohibited from retaining copies of works belonging to the collections of a library, archives, or museum, other than as necessary to perform a reproduction service; and
- (3) nothing immunizes the third party from liability for activities undertaken outside the scope of reproduction under this section.

(m) DEFINITIONS. — As used in this section,

- (1) a work has been “disseminated to the public” when the copyright owner, or any person authorized by the copyright owner, has published the work or otherwise exercised any of the rights set forth in paragraphs (3), (4), (5), or (6) of section 106 of this title with respect to that work;
- (2) a storage format is “obsolete” if the machine or device necessary to render perceptible a work stored in that format is no longer manufactured or is no longer reasonably available in the commercial marketplace.

**APPENDIX B**

**FEDERAL REGISTER NOTICE OF INQUIRY**



numbers) or by email at [DOL\\_PRA\\_PUBLIC@dol.gov](mailto:DOL_PRA_PUBLIC@dol.gov).

Submit comments about this request by mail or courier to the Office of Information and Regulatory Affairs, Attn: OMB Desk Officer for DOL–MSHA, Office of Management and Budget, Room 10235, 725 17th Street NW., Washington, DC 20503; by Fax: 202–395–5806 (this is not a toll-free number); or by email: [OIRA\\_submission@omb.eop.gov](mailto:OIRA_submission@omb.eop.gov). Commenters are encouraged, but not required, to send a courtesy copy of any comments by mail or courier to the U.S. Department of Labor–OASAM, Office of the Chief Information Officer, Attn: Departmental Information Compliance Management Program, Room N1301, 200 Constitution Avenue NW., Washington, DC 20210; or by email: [DOL\\_PRA\\_PUBLIC@dol.gov](mailto:DOL_PRA_PUBLIC@dol.gov).

**FOR FURTHER INFORMATION CONTACT:** Michel Smyth by telephone at 202–693–4129, TTY 202–693–8064, (these are not toll-free numbers) or by email at [DOL\\_PRA\\_PUBLIC@dol.gov](mailto:DOL_PRA_PUBLIC@dol.gov).

**SUPPLEMENTARY INFORMATION:** This ICR seeks to extend PRA authority for the Notification of Employee Rights under Federal Labor Laws information collection. President Barack Obama signed Executive Order 13496 (E.O. 13496) on January 30, 2009, requiring certain Government contractors and subcontractors to post notices informing their employees of their rights as employees under Federal labor laws. Regulations 29 CFR 471.11 provides for DOL to accept a written complaint alleging that a contractor doing business with the Federal government has failed to post the notice required by E.O. 13496. The section establishes that no special complaint form is required; however, a complaint must be in writing. In addition, the complaint must contain certain information, including the name, address, and telephone number of the person submitting the complaint and the name and address of the Federal contractor alleged to have violated the rule. The section also establishes that a written complaint may be submitted to either the Office of Federal Contract Compliance Programs or the OLMS. E.O. 13496 section 3 authorizes this information collection.

This information collection is subject to the PRA. A Federal agency generally cannot conduct or sponsor a collection of information, and the public is generally not required to respond to an information collection, unless it is approved by the OMB under the PRA and displays a currently valid OMB Control Number. In addition, notwithstanding any other provisions of

law, no person shall generally be subject to penalty for failing to comply with a collection of information that does not display a valid Control Number. See 5 CFR 1320.5(a) and 1320.6. The DOL obtains OMB approval for this information collection under Control Number 1245–0004.

OMB authorization for an ICR cannot be for more than three (3) years without renewal, and the current approval for this collection is scheduled to expire on July 31, 2016. The DOL seeks to extend PRA authorization for this information collection for three (3) more years, without any change to existing requirements. The DOL notes that existing information collection requirements submitted to the OMB receive a month-to-month extension while they undergo review. For additional substantive information about this ICR, see the related notice published in the **Federal Register** on February 11, 2016 (81 FR 7375).

Interested parties are encouraged to send comments to the OMB, Office of Information and Regulatory Affairs at the address shown in the **ADDRESSES** section within thirty (30) days of publication of this notice in the **Federal Register**. In order to help ensure appropriate consideration, comments should mention OMB Control Number 1245–0004. The OMB is particularly interested in comments that:

- Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;
- Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;
- Enhance the quality, utility, and clarity of the information to be collected; and
- Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

*Agency:* DOL–OLMS.

*Title of Collection:* Notification of Employee Rights under Federal Labor Laws.

*OMB Control Number:* 1245–0004.

*Affected Public:* Individuals or Households.

*Total Estimated Number of Respondents:* 10.

*Total Estimated Number of Responses:* 10.

*Total Estimated Annual Time Burden:* 13 hours.

*Total Estimated Annual Other Costs Burden:* \$5.

**Authority:** 44 U.S.C. 3507(a)(1)(D).

Dated: June 1, 2016.

**Michel Smyth,**

*Departmental Clearance Officer.*

[FR Doc. 2016–13306 Filed 6–6–16; 8:45 am]

**BILLING CODE 4510–CP–P**

## LIBRARY OF CONGRESS

### Copyright Office

[Docket No. 2016–4]

#### Section 108: Draft Revision of the Library and Archives Exceptions in U.S. Copyright Law

**AGENCY:** U.S. Copyright Office, Library of Congress.

**ACTION:** Notice of inquiry.

**SUMMARY:** The United States Copyright Office is inviting interested parties to discuss potential revisions relating to the library and archives exceptions in the Copyright Act, 17 U.S.C. 108, in furtherance of the Copyright Office's policy work in this area over the past ten years and as part of the current copyright review process in Congress. The Copyright Office has led and participated in major discussions on potential changes to section 108 since 2005, with the goal of updating the provisions to better reflect the facts, practices, and principles of the digital age and to provide greater clarity for libraries, archives, and museums. To finalize its legislative recommendation, the Copyright Office seeks further input from the public on several remaining issues, including, especially, provisions concerning copies for users, security measures, public access, and third-party outsourcing. The Copyright Office therefore invites interested parties to schedule meetings in Washington, DC to take place during late June through July 2016, using the meeting request form referenced below.

**DATES:** Written meeting requests must be received no later than 11:59 p.m. Eastern Time on July 7, 2016.

**ADDRESSES:** Please fill out the meeting request form found at [www.copyright.gov/policy/section108](http://www.copyright.gov/policy/section108), being sure to indicate which topics you would like to discuss. Meetings will be held at the U.S. Copyright Office, 101 Independence Ave. SE. (Madison Building, Library of Congress),

Washington, DC 20540, or as necessary, by phone.

**FOR FURTHER INFORMATION CONTACT:**

Chris Weston, Attorney-Advisor, Office of the General Counsel, [cwes@loc.gov](mailto:cwes@loc.gov), 202-707-8380; Emily Lanza, Counsel, Office of Policy and International Affairs, [emla@loc.gov](mailto:emla@loc.gov), 202-707-1027; or Aurelia J. Schultz, Counsel, Office of Policy and International Affairs, [aschu@loc.gov](mailto:aschu@loc.gov), 202-707-1027.

**SUPPLEMENTARY INFORMATION:**

**I. Background**

Congress enacted section 108 of title 17 in 1976, authorizing libraries and archives to reproduce and distribute certain copyrighted works on a limited basis for the purposes of preservation, replacement, and research, placing these excepted activities outside the scope of exclusive rights set forth in section 106.<sup>1</sup> Before 1976, these institutions relied on a combination of common law and professional practices to help determine the scope of permissible activities under the law, including non-binding agreements between libraries and publishers.<sup>2</sup> As libraries and archives increasingly employed photocopying in the 1950s and 1960s,<sup>3</sup> however, Congress began to explore the need for clearer guidance for all involved. In 1966, the House Judiciary Committee noted that past efforts to come to a reasonable arrangement on library photocopying had failed and urged “all concerned to resume their efforts to reach an accommodation under which the needs of scholarship and the rights of authors would both be respected.”<sup>4</sup> Several years later, the Senate Judiciary Committee also noted photocopying’s role in the “evolution in the functioning and services of libraries” and the need for Congress to

respond to these changes in technology with a statutory exception.<sup>5</sup>

Crafting an appropriate statutory exception for libraries and archives was part of a larger revision process undertaken and enacted by Congress as part of the 1976 Copyright Act. A key characteristic of section 108 is that it provides specific exceptions pertaining to frequent library and archives activities, such as preservation copying and making and distributing copies for users, but does not preclude these institutions from relying upon the more general fair use exception of section 107 as well. In fact, Congress enacted an express savings clause for fair use, thereby ensuring that courts could look to both provisions.<sup>6</sup>

As demonstrated by its focus on photocopying, section 108 was designed to address the prevalent use of print-based analog technology occurring at the time of enactment. Despite some minor adjustments in the Digital Millennium Copyright Act of 1998,<sup>7</sup> which partially took account of digital reproduction capabilities, the exceptions in section 108 therefore are stuck in time. They did not anticipate and no longer address the ways in which copyrighted works are created, distributed, preserved, and accessed in the twenty-first century.<sup>8</sup> Additionally, over time the structure and wording of section 108 have proven to be difficult to implement for both lawyer and layperson. Ultimately, section 108 “embodies some now-outmoded assumptions about technology, behavior, professional practices, and business models”<sup>9</sup> that require revision and updating.

The key aspects of section 108 and the policy work conducted to date are summarized below.

**A. Overview of Section 108**

Section 108 applies only to libraries and archives (terms that are not defined) that are either open to the general public or to unaffiliated researchers in the relevant specialized field.<sup>10</sup> Activities

covered by the section cannot be undertaken for “any purpose of direct or indirect commercial advantage,”<sup>11</sup> and copies must contain the copyright notice as it appears on the source copy, or if there is no such notice, bear a legend stating that the work may be protected by copyright.<sup>12</sup>

Section 108 includes two provisions for libraries and archives to make reproductions in order to maintain the works in their collections; these provisions apply to all categories of copyrighted works. The first such provision allows a library or archives to reproduce three copies of an *unpublished* work in its collections for purposes of preservation, security, or deposit for research in another eligible institution.<sup>13</sup> Digital copies made under this provision cannot be made available to the public outside the premises of the library or archives.<sup>14</sup> The second maintenance exception allows the reproduction of three copies of a *published* work for replacement purposes, but only if the source copy of the work is “damaged, deteriorating, lost, or stolen” or the copy is stored in an obsolete format, and the library or archives cannot locate an unused copy of the work at a fair price after a reasonable effort to do so.<sup>15</sup> The replacement exception contains the same restriction prohibiting distribution of digital copies outside the premises of the library or archives.<sup>16</sup>

Section 108 also contains a set of provisions concerning the reproduction and distribution of materials in an eligible institution’s collections for users, either upon direct request or as part of interlibrary loan. These exceptions do not apply to musical works; pictorial, graphic, or sculptural works (other than illustrations or similar adjuncts to literary works); and most audiovisual works, including motion pictures.<sup>17</sup> Libraries and archives may reproduce and distribute for a user one copy of an article or contribution to a collection, or a small part of a larger work.<sup>18</sup> They may also reproduce and distribute entire or substantial portions of works for users, but only if a reasonable investigation shows that a copy is not otherwise obtainable at a fair price.<sup>19</sup> Additionally, section 108 states that, in making and distributing copies for users, a library or archives may not

<sup>1</sup> See H.R. Rep. No. 94-1476, at 74-79 (1976), as reprinted in 1976 U.S.C.C.A.N. 5659, 5688-92.

<sup>2</sup> See Register of Copyrights, Library Reproduction of Copyrighted Works (17 U.S.C. 108) 14 (1983) (discussion of the “Gentlemen’s Agreement” of 1935, a voluntary agreement negotiated between publishers and libraries that set a standard of acceptable conduct for reproduction of copyrighted materials by libraries).

<sup>3</sup> A 1959 copyright study prepared at the request of Congress noted that the “various methods of photocopying have become indispensable to persons engaged in research and scholarship, and to libraries that provide research material in their collections to such persons.” Borge Varmer, U.S. Copyright Office at the Library of Congress, Study No. 15: Photoduplication of Copyright Material by Libraries, at 49 (1959), reprinted in Staff of S. Comm. on the Judiciary, 86th Cong., Copyright Law Revision: Studies Prepared for the Subcomm. on Patents, Trademarks, and Copyrights of the Comm. on the Judiciary, United States Senate: Studies 14-16 (Comm. Print 1960).

<sup>4</sup> H.R. Rep. No. 89-2237, at 65 (1966).

<sup>5</sup> S. Rep. No. 93-983, at 123 (1974).

<sup>6</sup> 17 U.S.C. 108(f)(4) (“Nothing in this section . . . in any way affects the right of fair use as provided by section 107 . . .”).

<sup>7</sup> Digital Millennium Copyright Act, Public Law 105-304, 404, 112 Stat. 2860, 2889 (1998) (expanding the number of copies and phonorecords permitted for purposes of preservation and security, for deposit for research use in another library or archives, and for replacement, from one to three; and restricting digital copies and phonorecords to the premises of the library or archives).

<sup>8</sup> Section 108 Study Group, The Section 108 Study Group Report i (2008), [www.section108.gov/docs/Sec108StudyGroupReport.pdf](http://www.section108.gov/docs/Sec108StudyGroupReport.pdf) (“Study Group Report”).

<sup>9</sup> *Id.*

<sup>10</sup> 17 U.S.C. 108(a)(2).

<sup>11</sup> *Id.* at 108(a)(1).

<sup>12</sup> *Id.* at 108(a)(3).

<sup>13</sup> *Id.* at 108(b).

<sup>14</sup> *Id.* at 108(b)(2).

<sup>15</sup> *Id.* at 108(c).

<sup>16</sup> *Id.* at 108(c)(2).

<sup>17</sup> *Id.* at 108(i).

<sup>18</sup> *Id.* at 108(d).

<sup>19</sup> *Id.* at 108(e).

engage in “related or concerted reproduction or distribution of multiple copies” of the same material,<sup>20</sup> and that, when making interlibrary loan copies, an institution cannot “do so in such aggregate quantities as to substitute for a subscription to or purchase of such a work.”<sup>21</sup>

In addition to its provisions governing internal maintenance copies and reproduction and distribution of copies for users, section 108 also provides libraries and archives with a safe harbor from liability for the unsupervised use of its on-premises reproducing equipment, provided that they post notices stating that making copies may be subject to copyright law.<sup>22</sup> Another provision gives libraries and archives the ability to reproduce, distribute, display, or perform any work in its last 20 years of copyright protection for preservation, scholarship, or research, provided the work is not being commercially exploited by its owner.<sup>23</sup>

Finally, subsection (f)(4) of section 108 contains two provisions that govern the exceptions’ overall applicability. It first states that nothing in section 108 “in any way affects the right of fair use as provided by section 107.”<sup>24</sup> Subsection (f)(4) also provides that any contractual obligation assumed by a library or archives upon obtaining a work for its collections supersedes the institution’s privileges under section 108.<sup>25</sup>

#### B. Revision Work to Date

As Congress has reviewed the copyright law in recent years, the Copyright Office has noted consistently that exceptions and limitations are critical to the digital economy and must be calibrated by Congress as carefully and deliberatively as provisions governing exclusive rights or enforcement. Section 108, in particular, has been a long-standing focus of the Copyright Office because, properly updated, it can provide professionals in

libraries, archives, and museums with greater legal certainty regarding the permissibility of certain core activities.

In 2005, the Copyright Office and the National Digital Information Infrastructure and Preservation Program of the Library of Congress sponsored and administered an independent study group charged with producing a report and set of recommendations on potential improvements to section 108. The study group members included distinguished and experienced librarians, copyright owners, archivists, academics, and other memory institution specialists and copyright lawyers.<sup>26</sup> The “Section 108 Study Group”<sup>27</sup> made note of a number of ways in which digital technologies have impacted copyright law, including “(1) opportunities for new revenue sources derived from new distribution methods, (2) increased risks of lost revenue and control from unauthorized copying and distribution, (3) essential changes in the operations of libraries and archives, [and] (4) changing expectations of users and the uses made possible by new technologies.”<sup>28</sup> Over the course of nearly three years, the Study Group engaged in analysis, review, and discussion of the best ways in which to update section 108 to address the digital age.

The Study Group issued its report in March 2008, calling for an extensive revision to update section 108.<sup>29</sup> The report also pointed out several areas where section 108 required amendment but where the members of the Study Group could not agree on a solution.<sup>30</sup> The Study Group unanimously recommended revising section 108 in nine separate areas, plus a general recommendation for re-organizing the section’s provisions. Among the more significant recommendations were to:

- Allow museums to be eligible along with libraries and archives.<sup>31</sup>
- Add new eligibility criteria, such as having a public service mission, employing a professional staff, and providing professional services.<sup>32</sup>
- Allow libraries and archives to outsource some of the activities permitted by section 108 to third parties, under certain conditions.<sup>33</sup>
- Replace the three-copy limits in the preservation, security, deposit for

research, and replacement provisions with conceptual limits allowing a limited number of copies as reasonably necessary for the given purpose.<sup>34</sup>

- Revise the prohibition on making digital preservation and replacement copies publicly available off-premises, so that it does not apply when the source and the new copy are in physical formats, such as CDs or DVDs.<sup>35</sup>
- Allow specially qualified institutions to preemptively reproduce publicly disseminated works at special risk of loss for preservation purposes only, with limited access to the copies.<sup>36</sup>

- Create a new provision for the capture, reproduction, and limited re-distribution of “publicly available online content,” e.g., Web sites and other works freely available on the internet.<sup>37</sup> Rights-holders would be allowed to opt out of having their content captured or re-distributed.<sup>38</sup>
- Apply the safe harbor from liability for copies made on unsupervised reproduction equipment to user-owned, portable equipment, as well as equipment residing on the library’s or archives’ premises.<sup>39</sup>

The Study Group also made note of several areas of section 108 that all members agreed required revision, but could not come to a unanimous decision on what the revision should look like.<sup>40</sup> The issues identified by the Study Group in this section of the Report concerned copies made at the request of users, specifically:

- The need to replace the single-copy limit with a “flexible standard more appropriate to the nature of digital materials.”<sup>41</sup>
- Explicitly permitting electronic delivery of copies for users under certain conditions.<sup>42</sup>
- Allowing copies for users to be made of musical works; pictorial, graphic, or sculptural works; and motion pictures and other audiovisual

<sup>34</sup> *Id.* at 52–54, 61–65.

<sup>35</sup> *Id.* at 52, 57, 61, 66.

<sup>36</sup> *Id.* at 69–79. The Report also recommended replacing the published/unpublished distinction with the more practical publicly disseminated/not publicly disseminated binary, wherein works made available to the public, but not via distribution of material copies (as is required for publication), would fall into the publicly disseminated category. See *id.* at 47–51.

<sup>37</sup> *Id.* at 80–87.

<sup>38</sup> *Id.* at 85–87.

<sup>39</sup> *Id.* at 91–92.

<sup>40</sup> *Id.* at 95–112. Additionally, a third section of the Report discussed issues that some, but not all, of the Study Group members thought merited statutory revision, including whether to allow certain exceptions to override contrary contractual agreements. *Id.* at 113–124.

<sup>41</sup> *Id.* at 98–101.

<sup>42</sup> *Id.* at 98, 101–103.

<sup>20</sup> *Id.* at 108(g)(1).

<sup>21</sup> *Id.* at 108(g)(2). Initial guidance as to the practical limits indicated by this phrase was provided by the National Commission on New Technological Uses of Copyrighted Works (CONTU), which in 1976 formulated guidelines for how many copies of a particular article or periodical could be made for interlibrary loan purposes without risking market substitution. H.R. Rep. No. 94–1733, at 72–73 (1976) (Conf. Rep.), as reprinted in 1976 U.S.C.A.N. 5809, 5813–14. Congress, while incorporating the CONTU guidelines into the Conference Committee Report to the Copyright Act of 1976, cautioned that they would require “continuous reevaluation and adjustment.” *Id.* at 71.

<sup>22</sup> 17 U.S.C. 108(f)(1).

<sup>23</sup> *Id.* at 108(h).

<sup>24</sup> *Id.* at 108(f)(4).

<sup>25</sup> *Id.*

<sup>26</sup> See Members of the Section 108 Study Group, <http://www.section108.gov/members.html> (last visited May 25, 2016).

<sup>27</sup> Referred to as the Study Group in this notice.

<sup>28</sup> Study Group Report at 28.

<sup>29</sup> *Id.* at iii.

<sup>30</sup> *Id.* at 95–112.

<sup>31</sup> *Id.* at 31–33.

<sup>32</sup> *Id.* at 34–38.

<sup>33</sup> *Id.* at 39–42.

works, under conditions that limit the risk of market substitution.<sup>43</sup>

Following the issuance of the Study Group's report, the Copyright Office, led by the then-Register of Copyrights, comprehensively reviewed the underlying analyses of the Study Group and examined a number of questions left unresolved due to lack of consensus amongst disparate Study Group members. On April 5, 2012, the current Register and senior staff met with Study Group members to review the 2008 report and discuss subsequent developments. Most Study Group members agreed that updating section 108 remained a worthwhile goal, and some suggested that the Report did not go far enough, particularly in recommending changes to the provisions regarding copies for users. Additionally, several members described an increasing practice of librarians and archivists more frequently relying upon fair use as the legal basis for their activities, making section 108 more urgent or less urgent as a revision matter, depending on one's perspective.

In February 2013, the Copyright Office co-sponsored with Columbia Law School a public conference on section 108, entitled "Copyright Exceptions for Libraries in the Digital Age: Section 108 Reform." The all-day conference served as a valuable and comprehensive adjunct to the Study Group Report. Among other issues, it addressed such topics as the current landscape of similar exceptions in the United States and internationally, the recommendations of the Study Group, what changes should be made to section 108 in terms of its scope, and whether and how mass digitization by libraries and archives should be permitted.<sup>44</sup>

More recently, section 108, along with the issues of orphan works and mass digitization, was the subject of a hearing on "Preservation and Reuse of Copyrighted Works" held by the House Subcommittee on Courts, Intellectual Property, and the Internet on April 2, 2014.<sup>45</sup> At the hearing, there was disagreement among the six witnesses

over whether or not section 108 reform is advisable as a legal matter or possible as a practical matter. One librarian-member of the Section 108 Study Group told Congress that the existing framework does not require amendment<sup>46</sup> and anticipated great difficulty in translating the Study Group's (limited) recommendations into effective legislation.<sup>47</sup> However, the co-chair of the Section 108 Study Group, the former general counsel to a book publisher, advocated for revisions, emphasizing the clarity that a "workable, up-to-date and balanced" section 108 could bring to both libraries and copyright owners "in specific situations."<sup>48</sup> Another witness, an audiovisual conservation expert at the Library of Congress, testified that it is important to "[m]odernize Sec[ti]on 108 so that the Library of Congress can fulfill its mission to preserve audiovisual and other materials,"<sup>49</sup> and recommended specific changes to the preservation, replacement, copies for users, and other provisions.<sup>50</sup>

Most recently, in her April 29, 2015, testimony to the House Judiciary Committee regarding the universe of copyright policy issues, the Register of Copyrights stated that section 108 is among the matters ready for Congressional consideration.<sup>51</sup> "Based on the entirety of the record to date," the Register explained,

the Office has concluded that Section 108 must be completely overhauled. One enduring complaint is that it is difficult to understand and needlessly convoluted in its

organization. The Office agrees that the provisions should be comprehensive and should be related logically to one another, and we are currently preparing a discussion draft. This draft will also introduce several substantive changes, in part based upon the recommendations of the Study Group's 2008 report. It will address museums, preservation exceptions and the importance of "web harvesting" activities.<sup>52</sup>

### C. The International Perspective

Many other countries have recognized the global significance of copying and preservation exceptions for libraries and archives and are also reviewing their relevant exceptions at this time. As of June 2015, 156 World Intellectual Property Organization (WIPO) member states had at least one statutory library exception, addressing issues such as making copies of works for readers, researchers, and other library users as well as copies for preservation.<sup>53</sup> The most recent WIPO study on copyright limitations and exceptions for libraries and archives observed that "exceptions for libraries and archives are fundamental to the structure of copyright law throughout the world, and that the exceptions play an important role in facilitating library services and serving the social objective of copyright law."<sup>54</sup>

Some countries have also recently considered updating and amending their statutory library exceptions to address the digital landscape. For example, Canada in 2012 amended its copyright statute to permit libraries, archives, and museums to provide digital copies of certain works to persons requesting the copies through another institution.<sup>55</sup> Similarly, the European Union has stated that in 2016 it would examine legislative proposals that would allow cultural heritage institutions to use digital technologies for preservation.<sup>56</sup>

For many years, WIPO has considered a treaty proposal on copyright limitations and exceptions for libraries and archives that would mandate a right of preservation for library and archival materials, enabling these institutions to reproduce for preservation purposes as

<sup>43</sup> *Id.* at 106–112.

<sup>44</sup> See *Symposium Issue: Section 108 Reform*, 36 Colum. J.L. & Arts 527 (2013); the program and videos of the program are available at *Section 108 Reform*, Kernochan Ctr. for Law, Media, and the Arts, <http://web.law.columbia.edu/kernochan/symposia/section-108-reform> (last visited May 10, 2016).

<sup>45</sup> *Preservation and Reuse of Copyrighted Works: Hearing Before the Subcomm. on Courts, Intellectual Prop., & the Internet of the H. Comm. on the Judiciary*, 113th Cong. (2014); the official transcript of the hearing is available at <https://judiciary.house.gov/wp-content/uploads/2016/02/113-88-87423.pdf>.

<sup>46</sup> *Id.* at 32 (testimony of James G. Neal, Vice President for Information Services and University Librarian, Columbia University) ("[T]he existing statutory framework, which combines the specific library exceptions in section 108 with the flexible fair use right, works well for libraries and does not require amendment.").

<sup>47</sup> *Id.* at 42 (statement of James G. Neal, Vice President for Information Services and University Librarian, Columbia University) (noting, for example the difficulty of resolving issues as simple as ". . . how museums should be defined, and the need to define libraries and archives, currently undefined in Section 108.").

<sup>48</sup> *Id.* at 30 (statement of Richard S. Rudick, Co-Chair, Section 108 Study Group).

<sup>49</sup> *Id.* at 11 (statement of Gregory Lukow, Chief, Packard Campus for Audio Visual Conservation, Library of Congress).

<sup>50</sup> *Id.* at 15–18 (for example, "[r]evis[e] subsections 108(b) and (c), which govern the reproduction of unpublished and published works, to allow for the use of current technology and best practices in the preservation of film, video, and sound recordings").

<sup>51</sup> *Register's Perspective on Copyright Review: Hearing Before the H. Comm. on the Judiciary*, 114th Cong. 5 (2015) (testimony of Maria A. Pallante, Register of Copyrights and Director, U.S. Copyright Office) ("[L]ibrary exceptions or the exceptions for persons who are blind or visually impaired . . . are outdated to the point of being obsolete . . . [these outdated exceptions] do not serve the public interest, and it is our view that it is untenable to leave them in their current state.").

<sup>52</sup> *Id.* at 20–21 (statement of Maria A. Pallante, Register of Copyrights and Director, U.S. Copyright Office) (citations omitted).

<sup>53</sup> Kenneth D. Crews, WIPO Study on Copyright Limitations and Exceptions for Libraries and Archives, WIPO Doc. SCCR/30/3, at 6 (June 10, 2015).

<sup>54</sup> *Id.*

<sup>55</sup> Copyright Act, R.S.C. 1985, c C–42, ss. 5.02, 30.2 (Can.).

<sup>56</sup> European Commission Press Release MEMO/15/6262, Making EU copyright rules fit for the digital age — Questions & Answers (Dec. 9, 2015), [http://europa.eu/rapid/press-release\\_MEMO-15-6262\\_en.htm](http://europa.eu/rapid/press-release_MEMO-15-6262_en.htm).

many copies of works that are needed in accordance with best professional practices.<sup>57</sup> Advocating a more “soft law” approach, the United States government instead has encouraged member states to adopt national statutory library exceptions that are consistent with their current international obligations<sup>58</sup> and that further the broad objectives of preservation and public service.<sup>59</sup>

## II. Revision of Section 108—Current Discussion Draft Proposals

The Copyright Office notes that, since the enactment of the Copyright Act of 1976, the views of the library and archives community regarding section 108 have become less uniform and more complicated, particularly as courts have supported newer applications of the fair use doctrine vis-à-vis a number of digitization and access activities. Indeed, fair use clearly supports a wider range of reproduction activities than it did when section 108 was first codified.<sup>60</sup> The ever-evolving nature of the law is instructive and important. Among other things, it underscores the advisability of allowing section 108 and section 107 to co-exist, while ensuring that each provision is positioned for the future, free from the analog restrictions of a bygone era.

As noted by the Study Group, updating section 108 would provide

<sup>57</sup> See The Case for a Treaty on Exceptions and Limitations for Libraries and Archives: Background Paper by IFLA, ICA, EIFL and INNOVARTE, WIPO Doc. SCCR/23/3 (Nov. 15, 2011).

<sup>58</sup> Article 9(2) of the Berne Convention for the Protection of Literary and Artistic Works provides that signatory countries may permit the reproduction of works “in certain special cases, provided that such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author.” Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, as last revised July 24, 1971, 25 U.S.T. 1341, 828 U.N.T.S. 221. The WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty apply the same standard outlined in Article 9(2) of the Berne Convention for all rights granted under those treaties. WIPO Copyright Treaty art. 10(2), Dec. 20, 1996, S. Treaty Doc. No. 105–17, 36 I.L.M. 65 (1997); WIPO Performances and Phonograms Treaty art. 16(2), Dec. 20, 1996, S. Treaty Doc. No. 105–17, 36 I.L.M. 76 (1997).

<sup>59</sup> Objectives and Principles for Exceptions and Limitations for Libraries and Archives, WIPO Doc. SCCR/26/8 (Jan. 10, 2014).

<sup>60</sup> See, e.g., *Authors Guild v. Google, Inc.*, 804 F.3d 202 (2d Cir. 2015), cert. denied, 136 S.Ct. 1658 (mem.) (2016); *Authors Guild, Inc. v. HathiTrust*, 755 F.3d 87 (2d Cir. 2014); see also Library Copyright Alliance, Before the House Committee on the Judiciary: Recommendations of the Library Copyright Alliance on Copyright Reform 4 (May 8, 2015), <http://www.librarycopyrightalliance.org/storage/documents/lca-copyright-reform-amendments.pdf> (“[A]s the recent decision in *Authors Guild v. HathiTrust* . . . makes clear, fair use supplements Section 108 and thus provides a sufficient mechanism for updating it when necessary.”).

libraries and archives with a clear and unequivocal basis for their digital preservation, distribution, and other activities, notwithstanding that some of these activities may also be permissible under fair use.<sup>61</sup> Congress specifically drafted section 108 to include a fair use savings clause in acknowledgement of the importance of fair use, noting in the 1976 Act’s legislative history that “[n]o provision of section 108 is intended to take away any rights existing under the fair use doctrine.”<sup>62</sup> Indeed, almost forty years later, the Chair of the House Judiciary Committee has recognized that a specific, and separate, library exception is still an important supplement to fair use because “fair use is not always easy to determine, even to those with large legal budgets[, and those with smaller legal budgets or a simple desire to focus their limited resources on preservation may prefer to have better statutory guidance than exists today.”<sup>63</sup> In fact, there is no reasonable question that the fair use doctrine should or will continue to be available to libraries and archives as an essential provision and planning tool, or that section 108 has proved valuable and should continue to set forth a list of excepted activities for the benefit of library professionals. If there is a lingering debate, it is more accurately about whether these excepted activities should be updated for the digital age or left in their increasingly irrelevant state, a question that is less about the importance of providing clear guidance to library, archives, and museum professionals and more about how sections 108 and 107 will operate together in the future.<sup>64</sup>

<sup>61</sup> See Study Group Report at 21–22; see also 17 U.S.C. 108(f)(4); *HathiTrust*, 755 F.3d at 94 n.4 (“[W]e do not construe § 108 as foreclosing our analysis of the libraries’ activities under fair use.”).

<sup>62</sup> H.R. Rep. No. 94–1476, at 74 (1976), as reprinted in 1976 U.S.C.A.N. 5659, 5687–88; see also S. Rep. No. 91–1219, at 6 (1970) (“The rights given to the libraries and archives by this provision of the bill are in addition to those granted under the fair-use doctrine.”). Further, the court in *HathiTrust* expressly rejected plaintiffs’ argument that fair use did not apply to the activities at issue in the case because section 108 alone governs reproduction of copyrighted works by libraries and archives, finding that because “section 108 also includes a ‘savings clause’ . . . we do not construe § 108 as foreclosing our analysis of the Libraries’ activities under fair use . . .” *HathiTrust*, 755 F.3d at 94 n.4.

<sup>63</sup> *Preservation and Reuse of Copyrighted Works: Hearing Before the Subcomm. on Courts, Intellectual Prop., & the Internet of the H. Comm. on the Judiciary*, 113th Cong. 6 (2014) (statement of Rep. Bob Goodlatte, Chairman, H. Comm. on the Judiciary).

<sup>64</sup> See, e.g., *id.* at 26 (testimony of Richard S. Rudick, Co-Chair, Section 108 Study Group) (noting that “reliance on section 107 for purposes that go far beyond those originally conceived or imagined invites, as we have seen, expensive litigation with

As a matter of public policy, the Copyright Office agrees with the House Chairman and the Study Group and observes further that maintaining provisions drafted in, and applicable primarily to, the analog era is antithetical to the purpose of a well-functioning copyright law. More specifically, the Copyright Office agrees in principle with and plans to incorporate many of the Study Group’s recommendations, including:

- Adding museums as eligible institutions.
- Expanding the preservation, security, and deposit for research exceptions to include published/publicly disseminated works.
- Creating a new exception to permit the reproduction and distribution of publicly available internet content for preservation and research purposes, with an opt-out provision.
- Allowing the outsourcing of certain section 108 activities to third-party contractors.
- Removing or revising the three-copy limitation for preservation and security, deposit for research, and replacement copies.

Finally, as noted above, it is widely known that section 108 suffers from fundamental problems with organization and clarity, hampering the practical ability of librarians and archivists to utilize the exceptions. In fact, while the Study Group suggested reorganizing section 108 rather than redrafting it,<sup>65</sup> the Copyright Office believes that redrafting is the better approach.

## III. Subjects of Public Inquiry

The Copyright Office invites interested parties to schedule a time to provide in-person input on the specific subjects below. Note that while the Copyright Office will provide a comprehensive recommendation to Congress, we are only revisiting a select number of discrete issues at this time. A party choosing to respond to this notice of inquiry need not plan to address every subject listed, but the Copyright Office requests that each responding party clearly identify each subject that it plans to discuss.

uncertain results.”); see also *The Scope of Fair Use: Hearing Before the Subcomm. on Courts, Intellectual Prop., & the Internet of the H. Comm. on the Judiciary*, 113th Cong. 7 (2014) (testimony of Peter Jaszi, Professor, Faculty Director, Glushko-Samuelson Intellectual Property Clinic, Washington College of Law, American University) (noting that specific exceptions like those found in section 108 can be highly valuable to particular groups of users even in static form because, “even though never comprehensive and often not up to date,” they are supplemented by fair use).

<sup>65</sup> Study Group Report at 93–94.

**Eligibility**

1. The attributes that an institution should possess in order to be eligible for the section 108 exceptions, and how to prescribe and/or regulate them.

**Rights Affected**

2. Limiting section 108 to reproduction and distribution activities, or extending it to permit public performance and display as well.

Copies for Preservation, Security, Deposit in Another Institution, and Replacement

3. Restricting the number of preservation and security copies of a given work, either with a specific numerical limit, as with the current three-copy rule, or with a conceptual limit, such as the amount reasonably necessary for each permitted purpose.

4. The level of public access that a receiving institution can provide with respect to copies of both publicly disseminated and non-publicly disseminated works deposited with it for research purposes.

**Copies for Users**

5. Conditioning the unambiguous allowance of direct digital distribution of copies of portions of a work or entire works to requesting users, and whether any such conditions should be statutory or arrived at through a rulemaking process.

**Preservation of Internet Content**

6. Conditioning the distribution and making available of publicly available internet content captured and reproduced by an eligible institution.

**Relation to Contractual Obligations**

7. How privileging some of the section 108 exceptions over conflicting contractual terms would affect business relationships between rights-holders and libraries, archives, and museums.

**Outsourcing**

8. What activities (e.g., digitization, preservation, interlibrary loan) to allow to be outsourced to third-party contractors, and the conditioning of this outsourcing.

**Other**

9. Whether the conditions to any of the section 108 exceptions would be better as regulations that are the product of notice-and-comment rulemaking or as statutory text.

10. Whether and how the use of technical protection measures by eligible institutions should apply to section 108 activities.

11. Any pertinent issues not referenced above that the Copyright Office should consider in relation to revising section 108.

Dated: June 2, 2016.

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## **NATIONAL AERONAUTICS AND SPACE ADMINISTRATION**

[Notice (16-039)]

### **Notice of Intent To Grant an Exclusive License**

**AGENCY:** National Aeronautics and Space Administration.

**ACTION:** Notice of intent to grant exclusive license.

**SUMMARY:** This notice is issued in accordance with 35 U.S.C. 209(e) and 37 CFR 404.7(a)(1)(i). NASA hereby gives notice of its intent to grant an exclusive license in the United States to practice the invention described and claimed in U.S. Non-Provisional Patent Application, Serial No. 13/573920, titled "System and Method for Air Launch from a Towed Aircraft," NASA Case No. DRC-012-011, and Provisional Patent Application, Serial No. 15/046789, titled "System and Method for Air Launch from a Towed Aircraft" NASA Case No. DRC-012-011B and any issued patents or continuations in part resulting therefrom, to Kelly Space & Technology Inc., having its principal place of business in San Bernardino, California. Certain patent rights in this invention have been assigned to the United States of America as represented by the Administrator of the National Aeronautics and Space Administration. The prospective exclusive license will comply with the terms and conditions of 35 U.S.C. 209 and 37 CFR 404.7.

**DATES:** The prospective exclusive license may be granted unless, within fifteen (15) days from the date of this published notice, NASA receives written objections including evidence and argument that establish that the grant of the license would not be consistent with the requirements of 35 U.S.C. 209 and 37 CFR 404.7. Competing applications completed and received by NASA within fifteen (15) days of the date of this published notice will also be treated as objections to the grant of the contemplated exclusive license.

Objections submitted in response to this notice will not be made available to the public for inspection and, to the extent permitted by law, will not be released under the Freedom of Information Act, 5 U.S.C. 552.

**ADDRESSES:** Objections relating to the prospective license may be submitted to Patent Counsel, NASA Management Office, Jet Propulsion Laboratory, 4800 Oak Grove Drive, M/S 180-800C, Pasadena, CA 91109, (818) 854-7770 (phone), 818-393-2607 (fax).

**FOR FURTHER INFORMATION CONTACT:** Mark Homer, Patent Counsel, NASA Management Office, Jet Propulsion Laboratory, 4800 Oak Grove Drive, M/S 180-800C, Pasadena, CA 91109, (818) 854-7770 (phone), 818-393-2607 (fax). Information about other NASA inventions available for licensing can be found online at <http://technology.nasa.gov>.

**Mark P. Dvorscak,**

*Agency Counsel for Intellectual Property.*

[FR Doc. 2016-13429 Filed 6-6-16; 8:45 am]

**BILLING CODE 7510-13-P**

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## **NATIONAL ARCHIVES AND RECORDS ADMINISTRATION**

### **Office of Government Information Services (OGIS)**

[NARA 2016-034]

### **Freedom of Information Act Advisory Committee**

**AGENCY:** National Archives and Records Administration.

**ACTION:** Charter Renewal of the Freedom of Information Act Advisory Committee. **SUMMARY:** The National Archives and Records Administration (NARA) is renewing the charter for the Freedom of Information Act (FOIA) Advisory Committee, a Federal advisory committee we established to study the current FOIA landscape across the executive branch and to advise NARA's Office of Government Information Services, the Government's FOIA ombudsman, on improvements to the FOIA.

**DATES:** We filed the renewed charter on May 20, 2016. It remains in effect for two years from that date, unless otherwise extended.

**ADDRESSES:** You may access the charter and other information about the FOIA Advisory Committee online at <http://www.ogis.archives.gov/foia-advisory-committee.htm>.

**FOR FURTHER INFORMATION CONTACT:** Kate Gastner by phone at 202-741-5770, by

**APPENDIX C**      **SUMMER 2016 MEETING PARTICIPANTS**

**APPENDIX C: SUMMER 2016 MEETING PARTICIPANTS**

The following organizations and individuals met with the Copyright Office in separate, off-the-record face-to-face and telephonic conversations regarding the revision of section 108:

- American Association of Law Libraries
- American Library Association
- American Society of Journalists and Authors
- Anabaptist Mennonite Biblical Seminary Library
- Artists Rights Society
- Association of American Publishers
- Association of American Universities
- Association of Medical Illustrators
- Association of Public & Land-Grant Universities
- Association of Research Libraries
- Authors Guild
- Howard Besser, professor and author
- Columbia University Libraries
- Copyright Alliance
- Copyright Clearance Center
- Cornell University Libraries
- Digital Media Licensing Association
- Digital Public Library of America
- Laura Gasaway, Section 108 Study Group co-chair
- Harvard University Libraries
- HathiTrust
- Intellectual Property Section, American Bar Association
- Internet Archive
- ITHAKA/Portico
- J. Paul Getty Trust
- Laura Jenneman, media librarian
- Kernochan Center for Law, Media, and the Arts, Columbia Law School
- Library Copyright Alliance
- Chris Lewis, media librarian
- Motion Picture Association of America
- Music Library Association
- National Music Publishers Association
- National Writers Union
- New York Public Library
- North Carolina State University Libraries
- Janice Pilch, copyright and licensing librarian
- Recording Industry Association of America
- RELX Group
- Richard Rudick, Section 108 Study Group co-chair
- Science Fiction & Fantasy Writers of America
- Society of American Archivists
- Software and Information Industry Association
- Time Warner
- UCLA Libraries
- University of Louisville
- University of Massachusetts Amherst Libraries
- University of Michigan
- University of Minnesota Libraries
- University of North Carolina Libraries
- University of Texas
- University of Virginia Libraries
- The Walt Disney Company



